Supreme Court, U.S.
FILED
OCT 31 2008
OFFICE OF THE CLERK
William K. Suter, Clerk

No. 08-596

IN THE
SUPREME COURT OF THE UNITED STATES

JASON SCOTT WILSON,
Petitioner,

v.

WARDEN KAREN HOGSTEN, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal inmate's confinement in highly restrictive conditions of administrative segregation for almost ten months creates a liberty interest requiring appropriate procedural protections, not afforded here, under the Due Process Clause of the United States Constitution?

PARTIES TO THE PROCEEDING

Petitioner is Jason Scott Wilson, plaintiff-appellee below.

Respondents are Warden Karen Hogsten, Troy Williamson, Lt. Lyons, Lt. Feltman, Lt. Clarkson, Lt. Hepner, Mr. Buck, Dr. Bonner, and John Doe, defendants-appellants below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jason Scott Wilson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The court of appeals' decision is reported at 269 Fed. Appx. 193 and is reprinted in the Appendix to the Petition (App.) at 1a-6a. The district court's decision is reprinted in the Appendix at 7a-29a.

JURISDICTION

The court of appeals issued its decision on March 14, 2008. App. 1a. A timely petition for rehearing was denied on June 4, 2008. App. 30a-31a. On August 27, 2008, Justice Souter extended the time for filing the petition for certiorari to and including November 1, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, *inter alia*, that: "No person . . . shall be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V. The full text of the amendment is reproduced at App. 32a. The relevant Federal Bureau of Prisons (BOP) regulation, 28 C.F.R. § 541.22, is reproduced at App. 33a-38a.

STATEMENT OF THE CASE

Petitioner, a federal inmate formerly incarcerated at the Federal Correctional Institute at Allenwood (FCI Allenwood) in White Deer, Pennsylvania, was placed in administrative segregation for approximately ten months, from April 13, 2005 until February 8, 2006. App. 8a, 25a. The first seven months of this placement were ostensibly connected with a pending investigation of Petitioner's possession of a single pornographic magazine. *Id.* After the investigation was completed on November 17, 2005, with no finding that he had engaged in any misconduct, Petitioner was kept in administrative segregation at FCI Allenwood for almost three additional months, at which time he was transferred to the general prison population at FCI Loretto. App. 25a.[1] No explanation has been given, nor is there any information on the record, as to why Petitioner was kept in administrative segregation after the investigation's conclusion.

While in administrative segregation, Petitioner allegedly did not receive an initial detention order or hearings before a Segregation Review Official, both of which are procedural protections required by the BOP regulation governing administrative detention, 28 C.F.R. § 541.22. App. 2a.

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[1] The Third Circuit stated that Petitioner stayed in administrative segregation for ten months during the investigation and an additional ten weeks after the investigation concluded. App. 3a. This appears to be a misreading of the district court opinion and the record. *See* App. 26a, 27a.

On January 17, 2006, Petitioner filed a civil rights action against Warden Karen Hogsten and other FCI Allenwood officials in federal district court alleging violations of his constitutional rights, including his Fifth Amendment rights, and seeking damages under the doctrine articulated by this Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). App. 2a. The District Court for the Middle District of Pennsylvania granted summary judgment to the defendants on the basis of qualified immunity, concluding that Petitioner had no liberty interest in remaining in the general population and thus the failure to provide procedural protections did not rise to the level of a constitutional violation. App. 23a-28a. The Third Circuit affirmed, holding that, under its precedent, the duration of Petitioner's confinement did not implicate a liberty interest. App. 2a-6a. In doing so, the Third Circuit deepened the existing circuit split as to when an inmate in administrative segregation may possess a liberty interest requiring procedural due process.

A. This Court's Jurisprudence Concerning Inmates' Liberty Interests

The United States Constitution confers a liberty interest — *i.e.*, the right to basic liberties such as the freedom to travel and freedom from incarceration — on all citizens through the Due Process Clause. *See* U.S. Const. amend. V. A liberty interest may also arise from rights created by federal or state law. *Mills v. Rogers*, 457 U.S. 291, 300 (1982). Under the Due Process Clause, any deprivation of these liberties must be accompanied by proper procedures.

See, e.g., Zinermon v. Burch, 494 U.S. 113, 125 (1990).

This Court has recognized that, even though inmates have reduced due process rights, they still retain constitutional protections. *See Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974). Thus, in the due process context, the Court has held that an inmate's liberty interest likewise may arise from the Constitution itself or from federal or state law. *Id.* However, as an examination of this Court's jurisprudence on procedural due process issues in the prison context demonstrates, the circumstances under which such a liberty interest may be found are far from clear.

The Court's first analysis of this area was in *Wolff*, which held that a state inmate's right to good-time credits created a liberty interest because, under state law, such credits affected the length of the inmate's incarceration. 418 U.S. at 557. The Court did not address whether an inmate's loss of lesser privileges also would trigger a liberty interest. *Id.* at 571 n.19 (noting the difficulty of distinguishing "between the procedures that are required where good time is forfeited and those that must be extended when solitary confinement is at issue" and suggesting that "minimum procedural safeguards" are required when solitary confinement is imposed). Two years later, however, this Court decided in *Meachum v. Fano*, 427 U.S. 215, 225-27 (1976), that a state inmate's transfer to another facility did *not* implicate a liberty interest. The Court distinguished *Meachum* from *Wolff* on the ground that the liberty interest in *Wolff* arose from state law, while in *Meachum* no comparable law existed. *Id.*

The applicable test was clarified in *Hewitt v. Helms*, 459 U.S. 460 (1983), which held that a state's prison-related statutes and regulations do not automatically confer a liberty interest. A statute providing only guidelines, for example, would not be sufficient. *Id.* at 470-71. By contrast, the mandatory language of the state statute prescribing specific procedural requirements for administrative segregation at issue in *Hewitt* gave the inmate a liberty interest. *Id.* at 471-72 (giving examples of "shall," "will," and "must" as mandatory language). Following *Hewitt*, lower courts became caught up in parsing language to determine whether even statutes or policies such as those governing televisions in cells or when an inmate receives a tray lunch instead of a sack lunch created a liberty interest. *See Sandin v. Conner*, 515 U.S. 472, 482-83 (1995).

This Court attempted to remedy that situation in *Sandin*, which concerned a state inmate's claim that his confinement in thirty days' disciplinary segregation after his prison's adjustment committee found him guilty of physically obstructing a search violated his due process rights. *Id.* at 475-76. While the *Sandin* Court agreed with prior decisions that "States may under certain circumstances create liberty interests which are protected by the Due Process Clause," it concluded that federal courts had become overly preoccupied with analyzing statutory language rather than looking at the nature of the inmates' deprivations and thus had "strayed from the real concerns undergirding the liberty protected by the Due Process Clause." *Id.* at 483-84. Thus this Court held that "these [state-created] interests will be generally limited to freedom from restraint which,

while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless *imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.*" *Id.* at 484 (internal citations omitted) (emphasis added).

The *Sandin* Court did not elaborate on what the "ordinary incidents of prison life" entailed, but did find that the inmate's thirty-day disciplinary segregation "mirrored those conditions imposed upon inmates in administrative segregation and protective custody . . . . Indeed, the conditions at [the prison] involve significant amounts of 'lockdown time' even for inmates in the general population." *Id.* at 486. As a result, this Court held that, "[b]ased on a comparison between inmates inside and outside disciplinary segregation, the State's actions in placing him there for 30 days did not work a major disruption in his environment" and thus did not afford the inmate a liberty interest. *Id.* at 486-87.

As discussed in detail below, lower courts following *Sandin* have applied a variety of tests and used a range of "baseline" groups against which an inmate's circumstances are compared, in determining whether an inmate possesses a liberty interest. This Court recognized the circuit split on this issue in *Wilkinson v. Austin*, 545 U.S. 209 (2005), but declined to resolve it. *Id.* at 223 ("In *Sandin*'s wake, the Courts of Appeals have not reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant in any particular prison system.") (collecting cases). The *Wilkinson* Court did, however, observe that the Ohio

State Penitentiary's Supermax conditions at issue in that case were more restrictive than conditions elsewhere in the Ohio state prison system and held that, under *Sandin*, inmates assigned to the facility had a liberty interest because such placement "impose[d] an atypical and significant hardship under any plausible baseline." *Id.*

B. Factual and Procedural Background

1. While incarcerated at FCI Allenwood, Petitioner was placed in administrative segregation at the prison's Special Housing Unit pending an investigation related to a single pornographic magazine found in his locker. App. 25a. Had Petitioner been found to have possessed the magazine, he could have been subjected to restricted confinement for a maximum of only fifteen days in disciplinary segregation. 28 C.F.R. § 541.13, Table 3. Instead, Petitioner spent nearly ten months in administrative segregation in conditions substantially similar to those mandated for disciplinary segregation.[2]

Petitioner's time in administrative segregation began on April 13, 2005. App. 8a. The Special Investigative Service (SIS) investigation ended on November 17, 2005, App. 25a, and "ultimately concluded that [Petitioner] was not involved in any

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[2] As discussed above, Petitioner alleges, and declarations from fellow inmates confirm, that inmates in administrative segregation at FCI Allenwood were subjected to conditions much closer to disciplinary segregation than to what the BOP mandates for administrative segregation. *Compare* 28 C.F.R. § 541.21 *with* 28 C.F.R. § 541.22(d).

illegal activity." App. 25a n.8. Petitioner thus remained in administrative segregation for seven months under the guise of an investigation[3] for an offense with which he was not charged and which, at most, carried a fifteen-day penalty. Moreover, no circumstances justifying Petitioner's continued segregation after his exoneration were ever advanced. For example, there is no indication that Petitioner either posed a threat to others or engaged in violent behavior.

Petitioner maintains that, while in administrative detention, he received neither an administrative detention order (ADO) nor any opportunity to appear before the Segregation Review Official (SRO), both procedures mandated by BOP regulations. *See* Compl. ¶¶ 15-16;[4] 28 C.F.R. § 541.22(b), (c). Petitioner also was deprived of the protection of the BOP regulation providing that administrative segregation should only be used for short periods of time, to be concluded when the reason for placement there ceases. *See* 28 C.F.R. § 541.22(c). Prison officials have admitted that an ADO for Petitioner cannot be located. Defs.' Statement of Material Facts in Support of Mot. for Summ. J., Jan. 7, 2007, at ¶ 5; *see also* App. 25a. (using as a starting point for its holding the assumption the ADO was never issued). And prison

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[3] Prison officials supplied the district court with information regarding the investigation in declarations filed under seal, App. 25a nn.8 & 9, which were never served on Petitioner.

[4] Citations to "Compl." herein are to the operative amended complaint, filed on September 27, 2006.

officials have *never* advanced any justification for keeping Petitioner in segregation past the conclusion of the SIS investigation.

In November 2005, after being told that the investigation was completed, Petitioner requested forms for internal resolution from his counselor. *See* Compl. ¶ 23. Petitioner contends that, a few hours after his request, a prison official threatened him with an incident report if he began an administrative remedy procedure. Compl. ¶ 24.[5] Petitioner then filed his federal complaint.

In his complaint, Petitioner claimed that the deprivation of procedural protections and his ensuing placement in administrative segregation, where he was subjected to highly restrictive and onerous conditions, violated his due process rights. According to Petitioner and other inmates, administrative segregation at FCI Allenwood involves being in lockdown for 23 hours per day, and the remaining hour, to be used for exercise, is not always given. *See* Pl.'s Resp. Br. In Opp'n to Defs.' Mot. To Dismiss, Mar. 2, 2007 ("Pl.'s Response"), at 29-30.[6] Inmates in administrative segregation are permitted only one

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[5] The District Court found that there were disputed issues of material fact regarding whether Petitioner had exhausted his administrative remedies and refused to grant summary judgment on exhaustion grounds. App. 18a.

[6] At summary judgment, prison officials did not dispute this or any other of Petitioner's contentions concerning conditions and visitation at FCI Allenwood. *See generally* Br. In Support of Defs.' Mot. To Dismiss, or, in the alternative, for Summ. J., Jan. 3, 2007.

fifteen-minute phone call per month, have severely restricted visitation, and must shower and eat in their cells. *See id.* While in administrative segregation, Petitioner could not continue the educational programs in which he had been involved as a member of the general prison population. *See* Compl. ¶ 37. Moreover, for approximately five of the ten months Petitioner was in administrative segregation, a third person was placed in his two-person cell. *See* Pl.'s Response at 29-30.

2. The United States District Court for the Middle District of Pennsylvania granted summary judgment to the defendant prison officials on the basis of qualified immunity. App. 22a-28a. The district court relied solely on *Griffin v. Vaughn*, 112 F.3d 703 (3d Cir. 1997), in which the Third Circuit interpreted *Sandin*'s baseline as requiring a comparison of the circumstances of inmates in administrative segregation with those of other inmates also in administrative segregation. Using this baseline, the Third Circuit determined in *Griffin* that a Pennsylvania state regulation did not create a liberty interest for an inmate confined to administrative segregation for fifteen months. Here, the district court looked only at the duration of Petitioner's confinement to administrative segregation and determined that, under *Griffin*, a placement of less than fifteen months did not trigger a liberty interest. App. 24a-26a.

The district court also held that: (1) Petitioner's involvement in an SIS investigation created an adequate reason for his placement in administrative segregation, and so the lack of the mandated ADO was not problematic enough to violate Petitioner's

due process rights, App. 25a; (2) Petitioner's continued confinement in administrative segregation from November 17, 2005 until February 8, 2006 (which the court characterized as "approximately ten (10) weeks") awaiting transfer was not long enough to rise to an atypical and significant hardship under the district court's reading of *Sandin*, even though the supposed justification for his placement there was gone, App. 25a-26a; and (3) a grant of summary judgment against Petitioner was appropriate on the issue of the SRO reviews, which Petitioner had contended were not performed as mandated by BOP regulations, because the court found that the defendants had provided sufficient support for their contention that Petitioner had received these reviews and assessments.[7] App. 27a-28a. These conclusory determinations were made without any discussion of the allegations contained in Petitioner's Complaint.

3. In its short opinion affirming the district court, the Third Circuit also relied solely on its decision in *Griffin*. Thus, the Third Circuit examined only the initial reason given for Petitioner's placement in administrative segregation and the length of time Petitioner spent there before deciding this confinement did not impose an atypical and significant hardship triggering a liberty interest. App. 4a-5a. Like the district court, the court of appeals did not examine conditions at FCI Allenwood. It also failed to take into account this

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[7] Although Petitioner initially alleged that psychological assessments also were not performed, he has since abandoned that claim.

Court's recent opinion in *Wilkinson* (decided after *Griffin*), which necessarily implies, contrary to the *Griffin* test, that the *Sandin* baseline for determining what constitutes an atypical and significant hardship is not restricted to a comparison with inmates held in the same type of segregated housing.[8]

REASONS FOR GRANTING THE PETITION

This case raises significant and recurring questions regarding the scope of constitutional protections provided to federal prisoners. This Court has long held that, in addition to liberty interests arising from the Constitution itself, the government may also create liberty interests for inmates through statutes and regulations. *Sandin*, 515 U.S. at 483-84.[9] However, the circumstances under which such an interest will be found are not clear.

In *Sandin*, this Court attempted to delineate the appropriate analysis in this area, holding that a liberty interest may be found when a deprivation of rights conferred by the government imposes on the inmate an "atypical and significant hardship relative to the ordinary incidents of prison life." *Id.* at 484. *Sandin* did not, however, provide clear guidance as to

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[8] The court of appeals also affirmed the district court's dismissal of Petitioner's Eighth Amendment claim. App. 6a. Petitioner does not seek review of that issue before this Court.

[9] Although this Court's case law deals with state inmates, the courts of appeals apply the same analysis in the federal context. *See* App. 2a-6a; *see generally Tellier v. Fields*, 280 F.3d 69 (2d Cir. 2000); *Richardson v. Joslin*, 501 F.3d 415 (5th Cir. 2007); *Crowder v. True*, 74 F.3d 812 (7th Cir. 1996); *Hill v. Fleming*, 173 Fed. Appx. 664 (10th Cir. 2006).

what constitutes the "ordinary incidents of prison life." Instead, it used various methods — looking to the conditions of inmates in administrative segregation, protective custody, and the general prison population — to determine that the inmate had not been subjected to an atypical and significant hardship. Nowhere did the Court specify which of these baselines lower courts should use when making similar determinations.

As a result, the courts of appeals have struggled to determine the baseline against which an inmate's conditions of confinement should be compared when determining whether the inmate has been subjected to the type of "atypical and significant hardship" required to trigger a liberty interest. Some circuits measure the inmate's conditions and duration of administrative segregation against the circumstances of the general prison population; others read *Sandin* narrowly and measure the inmate's circumstances only against those of other inmates in similar segregation placements or against the most restrictive possible placement; and still others have not stated any test, instead proceeding on a case-by-case basis. *See* Section I, *infra*.

This Court has acknowledged this split, but thus far has declined to resolve it. *Wilkinson*, 545 U.S. at 223. Time has shown, however, that this Court's intervention is required. The circuits are not simply split on this issue; rather, lower court precedent in this area is in complete disarray. This confusion has created an untenable situation where the scope of a federal inmate's constitutional rights depends on the circuit in which he or she happens to be incarcerated. Moreover, as the decision below shows, the lower

courts have not grappled with this Court's recent decision in *Wilkinson*, which necessarily rejects a narrow reading of *Sandin*'s baseline, resulting in tension between lower court case law and this Court's precedent. Finally, the division among the circuits prevents uniform protection of inmates' constitutional rights throughout the federal prison system and creates corresponding problems for the uniform administration of federal prison policy.

The courts of appeals have asked for clarification in this area, *see, e.g.*, *Brown v. Plaut*, 131 F.3d 163, 170 (D.C. Cir. 1997); *Wagner v. Hanks*, 128 F.3d 1173, 1176 (7th Cir. 1997), and this Court's review is warranted.

I. THE CIRCUITS ARE DEEPLY DIVIDED ON WHEN AN INMATE IN ADMINISTRATIVE SEGREGATION MAY POSSESS A LIBERTY INTEREST REQUIRING PROCEDURAL DUE PROCESS.

After *Sandin*, the courts of appeals are in agreement that federal and state governments may, through their statutes, regulations, and policies, confer on inmates a liberty interest in avoiding restrictive confinement. But that is their only point of commonality on the issue. The circuits, as discussed above, are deeply divided regarding what baseline of comparison should be used to determine whether an inmate who has suffered a deprivation of rights conferred by the government has been subjected to an "atypical and significant hardship" that triggers a liberty interest and accompanying procedural protections. Indeed, it is virtually impossible to characterize the vastly differing

approaches to this question taken by the courts of appeals. This Court's intervention is required to bring clarity to this important area of the law.[10]

A. The Fourth And Ninth Circuits Have Properly Found That The Baseline Is The Circumstances Of The General Prison Population, And The Second Circuit Has Moved In This Direction.

Both the Fourth and Ninth Circuits have interpreted *Sandin* as requiring the use of the general prison population as the baseline for determining whether a liberty interest exists. *See Beverati v. Smith*, 120 F.3d 500, 503 (4th Cir. 1997) (examining conditions of inmates in administrative segregation as compared to those of inmates in the

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[10] This confusion is precisely what was predicted by the dissenting opinions in *Sandin*. *See* 515 U.S. at 490, n.2 (Ginsburg, J., dissenting) ("The Court ventures no examples, leaving consumers of the Court's work at sea, unable to fathom what would constitute an 'atypical, significant deprivation,' and yet not trigger protection under the Due Process Clause directly."); *id.* at 497 (Breyer, J., dissenting) (explaining that after *Sandin*, "[t]here is a broad middle category of imposed restraints or deprivations that, considered by themselves, are neither obviously so serious as to fall within, nor obviously so insignificant as to fall without, the Clause's protection," creating a "difficult line-drawing task"). For example, the Second Circuit has listed at least nine different issues left open by *Sandin*. *See Sealey v. Giltner*, 197 F.3d 578, 583, 588-89 (2d Cir. 1999) (discussing ambiguities in *Sandin* and the resulting circuit split); *see generally* John K. Edwards, Note, *A Prisoner's Threshold for Procedural Due Process After* Sandin v. Conner: *Conservative Activism or Legitimate Compromise?*, 33 Hous. L. Rev. 1521 (1997).

general prison population to determine whether segregated confinement imposed an atypical and significant hardship); *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996) (interpreting *Sandin* as suggesting "that a major difference between the conditions for the general prison population and the segregated population triggers a right to a hearing"), *opinion amended by* 135 F.3d 1318 (1998) (adding additional quotation from *Sandin*); *see also, e.g.*, *Sealey*, 197 F.3d at 588 (observing that the Fourth and Ninth Circuits "compare[] restrictive confinement to conditions for the general prison population").

The Second Circuit's analysis of *Sandin* has evolved somewhat differently. However, while focusing largely on the duration of an inmate's restricted confinement, that court has strongly suggested that the general prison population should be used as the baseline. *See, e.g.*, *Colon v. Howard*, 215 F.3d 227, 231-32 (2d Cir. 2000) (holding that inmate's "confinement for 305 days in standard SHU conditions met the *Sandin* standard" in part because the court was "unaware of any data showing that New York frequently removes prisoners from general population for as long as the 305 days served"); *Tellier*, 280 F.3d at 80 (holding that BOP regulation governing administrative segregation, 28 C.F.R. § 541.22, gave rise to a colorable claim to a liberty interest when inmate was segregated for 514 days "under conditions that differ markedly from those in the general prison population"); *cf. Sealey*, 197 F.3d at 589 (suggesting that for disciplinary segregation the appropriate comparison might be to conditions in

both administrative segregation and the general prison population).

B. The D.C., Third, Fifth, And Seventh Circuits Have, By Contrast, Interpreted *Sandin* Narrowly.

Although their approaches to this issue defy easy characterization, the D.C., Third, Fifth, and Seventh Circuits have interpreted *Sandin* narrowly, applying very restrictive baselines. Thus, inmates challenging their placement in administrative segregation in these circuits on due process grounds stand little to no chance of demonstrating that they have a liberty interest in avoiding segregated confinement. *See, e.g.*, *Wagner*, 128 F.3d at 1175 (observing that its reading of *Sandin* made "apparent that the right to litigate disciplinary confinements has become vanishingly small").

1. The Baseline in the D.C. Circuit is the Most Restrictive Conditions in All Prisons to Which the Prisoner May Be Transferred.

In *Hatch v. District of Columbia*, 184 F.3d 846 (D.C. Cir. 1999), the D.C. Circuit recognized the circuit split in this area but declined to follow the approach of the Fourth and Ninth Circuits. Instead, it stated a different, narrower baseline: "we hold that due process is required when segregative confinement imposes an 'atypical and significant hardship' on an inmate in relation to the most restrictive conditions that prison officials . . . routinely impose on inmates serving similar sentences." *Id.* at 847. These conditions include not only "the usual conditions of administrative segregation" at the facility where the inmate is

incarcerated but also "more restrictive conditions at other prisons if it is likely both that inmates serving sentences similar to [the inmate's] will actually be transferred to such prisons and that once transferred they will actually face such conditions." *Id.* Courts have applied *Hatch* to hold that the conditions of confinement of inmates in administrative segregation will never be atypical given that the comparison group is other inmates in similar confinement. *See, e.g., Brown v. District of Columbia*, 66 F. Supp. 2d 41, 46 (D.D.C. 1999) ("Because the appropriate baseline for judging the typicality of a restraint is administrative segregation, it is apparent that the *conditions* of plaintiff's restraint cannot be found to impose an 'atypical and significant hardship,' for the simple reason that his confinement was not only comparable to but was in fact administrative segregation.").

2. The Third Circuit Uses the Duration of Segregation and Circumstances of Other Prisoners in Administrative Detention as the Baseline.

A discussed above, the Third Circuit held in *Griffin* and reiterated in this case that the appropriate baseline is the circumstances of other inmates in segregation. *See* 112 F.3d at 706; App. 4a-5a. The Third Circuit recognized that *Sandin* looked both at the circumstances of other inmates in disciplinary segregation and the circumstances of inmates elsewhere in the prison system in deciding whether the inmate in that case suffered an atypical and significant hardship. *Griffin*, 112 F.3d at 706 & n.2. However, it interpreted *Sandin* as affirming *Meachum* and reasoned that, if the general prison population was the baseline, the *Meachum* Court

should have found that an inmate's transfer to a more secure facility required procedural due process. *Id.*

The Third Circuit therefore has focused on the conditions and duration of the inmate's confinement in administrative segregation in comparison with the length of confinement of other inmates placed there in determining whether a liberty interest exists. As a result, the court has found such liberty interests only in cases involving excessively long periods of segregation, and other claims are judged solely against these. *See, e.g., Shoats v. Horn*, 213 F.3d 140, 144 (3d Cir. 2000) (holding that inmate confined to administrative custody for eight years had a liberty interest); *see also Gans v. Rozum*, 267 Fed. Appx. 178, 180 (3d Cir. 2008) (holding that, in light of *Shoats*, inmate confined to administrative custody for eleven years had a liberty interest), *cert. denied*, 77 U.S.L.W. 3199 (Oct. 6, 2008).

3. The Fifth and Seventh Circuits Do Not Recognize a Liberty Interest in Avoiding Segregated Confinement Unless That Status Affects the Duration of the Inmate's Sentence.

The Fifth Circuit has adopted perhaps the narrowest reading of *Sandin*. In *Carson v. Johnson*, 112 F.3d 818, 821 (5th Cir. 1997), it unequivocally rejected the inmate's request for reassignment from administrative segregation, holding that: "Prisoners have no liberty interest in avoiding disciplinary segregation, at least where the status does not 'inevitably affect the duration of [the] sentence.'" *Id.* (quoting *Sandin*, 515 U.S. at 487). The Fifth Circuit did not discuss the comparisons *Sandin* made

between the circumstances of the inmate there with others in segregation and with those in the general population.[11]

The Seventh Circuit's recent decision in *Townsend v. Fuchs*, 522 F.3d 765, 771 (7th Cir. 2008), aligns it with the Fifth Circuit in holding that, because administrative and disciplinary segregation are discretionary, inmates never have a liberty interest in avoiding transfer to segregated confinement. *See also id.* at 772 (further observing that inmate's restricted confinement was not indefinite and did not affect his parole eligibility). This restrictive holding is the outgrowth of earlier Seventh Circuit precedent suggesting that *Sandin* left no room for a more lenient test. *See Wagner*, 128 F.3d at 1176 (concluding that "[t]he logic of *Sandin* implies that the conditions of [an inmate's] disciplinary segregation are atypical only if no prison in the United States to which he might be transferred for nondisciplinary reasons is more

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[11] In other contexts, the Fifth Circuit has recently compared "qualitative" differences between an inmate's situation and "'the punishment characteristically suffered by a person convicted of crime,'" but it does not appear to have adopted this approach when deciding whether an inmate has a liberty interest in avoiding segregated confinement. *Richardson*, 501 F.3d at 419-20 (quoting *Sandin*, 515 U.S. at 479 n.4, in determining that inmate's procedural due process rights were not violated when his eligibility for a reduction in sentence following completion of a drug rehabilitation program was revoked); *see also Samford v. Staples*, 249 Fed. Appx. 1001, 1004 (5th Cir. 2007) (holding inmate did not have a liberty interest in being free from a strip search when he alleged no facts showing that the ordered search imposed a hardship atypical of ordinary prison life).

restrictive," recognizing that this is a "harsh result," and requesting "clarification of the issue by the Court").

C. The First, Sixth, Eighth, Tenth, And Eleventh Circuits Have Not Clearly Articulated A Baseline.

The First, Sixth, Eighth, and Eleventh Circuits have not weighed in on which baseline is appropriate. Instead, these circuits approach this issue on a case-by-case basis. *See, e.g., Skinner v. Cunningham*, 430 F.3d 483, 486-87 (1st Cir. 2005); *Harden-Bey v. Rutter*, 524 F.3d 789, 795 (6th Cir. 2008); *Williams v. Norris*, 277 Fed. Appx. 647, 648-49 (8th Cir. 2008); *Thomas v. Warner*, 237 Fed. Appx. 435, 438 (11th Cir. 2007).

The Tenth Circuit has acknowledged that, in determining whether a liberty interest is triggered, it has at times compared the circumstances of inmates placed in administrative segregation with those of other inmates placed there, while at other times it has compared them with inmates in the general prison population, and has not yet actually adopted either baseline. *See, e.g., Ajaj v. United States*, No. 07-1073, 2008 WL 4192738, at *8-*10 (10th Cir. Sept. 15, 2008) (acknowledging "that our own opinions have inconsistently used comparisons either with inmates in the same segregation or those in the general prison population") (internal citations omitted); *Estate of DiMarco v. Wyoming Dep't of Corrections*, 473 F.3d 1334 (10th Cir. 2007) (same).[12]

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[12] The *DiMarco* court went further and eschewed the

II. THE DECISIONS OF THE COURT BELOW, AS WELL AS THOSE OF THE D.C., FIFTH, AND SEVENTH CIRCUITS, ARE IN TENSION WITH THIS COURT'S DECISIONS IN *SANDIN* AND *WILKINSON*.

As discussed above, the D.C., Third, Fifth, and Seventh Circuits restrictively interpret *Sandin* and do not look to the general prison population as a point of comparison for determining when an inmate in administrative segregation has suffered an "atypical and significant hardship." *See, e.g., Griffin*, 112 F.3d 703; *Hatch*, 184 F.3d 846; *Carson*, 112 F.3d 818; *Townsend*, 522 F.2d 765. Because *Sandin* clearly left open the possibility that the government may create a liberty interest in avoiding administrative segregation where certain circumstances of confinement are imposed, *see* 515 U.S. at 483-84, the Fifth and Seventh Circuits' holdings that such an interest essentially *never* exists absent a lengthening of an inmate's sentence are in clear tension with *Sandin*. The restrictive baselines used by the D.C. and Third Circuits also are at odds with *Sandin* because the Court's final determination that the inmate in that case did not have a liberty interest was based on a comparison with inmates outside segregation. *Id.* at 486-87 (stating that "*based on a comparison between*

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baselines entirely, stating that "a few key factors, none dispositive," was the better approach and suggesting factors such as the placement's justification, the extremity of the placement's conditions, the effect the placement has on the overall confinement's duration, and whether the placement was for an indefinite time. 473 F.3d at 1342.

inmates inside and outside disciplinary segregation, the State's actions in placing [the inmate] there for 30 days did not work a major disruption in his environment" and therefore did not impose an atypical and significant hardship) (emphasis added).

Although this confusion is somewhat understandable given that *Sandin* looked to the circumstances of inmates inside and outside restrictive confinement (including inmates in the general prison population) without clearly articulating the appropriate comparison, this Court's recent decision in *Wilkinson* makes clear that these Circuits' narrow interpretations are inappropriate. In *Wilkinson*, the Court held that placement in Ohio's Supermax prison implicated a liberty interest under any baseline. 545 U.S. at 223-24. In coming to this conclusion, this Court looked to the Ohio inmates' conditions, the indefinite duration of their confinement in the Supermax facility, and the effect that confinement had on their parole. 545 U.S. at 224; *see also id.* at 214 (observing that "[c]onditions at OSP are more restrictive than any other form of incarceration in Ohio"). Had the *Wilkinson* Court used a baseline of other Ohio Supermax inmates, all of whom were in custody situations similar to the petitioners, no liberty interest would be created under the *Sandin* test because the petitioners' confinement would not have been atypical. The necessary implication is therefore that the Court compared the circumstances of the Supermax inmates with those in less restrictive custody in order to find a liberty interest.

The D.C., Third, and Fifth Circuits have not reconsidered their rigid positions in light of

Wilkinson, and the Seventh Circuit's discussion of *Wilkinson* in its recent *Townsend* decision simply brushes aside *Wilkinson*'s consideration of the conditions of confinement in the Supermax facility. Indeed, in the decision below, the Third Circuit summarily cited *Sandin* and followed *Griffin* without even mentioning the subsequent decision in *Wilkinson*. This failure to reconcile with the implications of *Wilkinson* puts the jurisprudence of these circuits in tension with this Court's precedent and requires this Court's review.

III. RESOLUTION OF THE QUESTION PRESENTED IS IMPORTANT TO PROTECT CONSTITUTIONAL RIGHTS AND TO ENSURE UNIFORM ADMINISTRATION OF FEDERAL PRISONS.

This Court's clarification of when a liberty interest in avoiding segregated confinement exists is necessary both to protect inmates' constitutional rights and to ensure uniform administration throughout the federal prison system. To function fairly and effectively, the federal prison system needs uniformity in how its prisoners are treated. The current circuit split creates greater rights for some federal prisoners than others, based purely on the circuit in which the prisoner is incarcerated. This situation also creates uncertainties for prison officials and places additional burdens on the lower courts, which must sort through conflicting precedent in deciding the many due process cases before them.

Uniformity is particularly important for federal prisoners, who do not have the additional remedies for violations of their procedural protections that

many state inmates can receive via state law.[13] As demonstrated by this case, a federal prisoner has limited means to remedy a nonmeritorious placement in administrative segregation.[14] After the frustration of his attempt to pursue administrative remedies for his placement in administrative segregation, Petitioner's only recourse was to the federal courts through a *Bivens* action. Due to his incarceration in the Third Circuit, which examines only the duration of an inmate's confinement in segregated custody and the conditions of other similarly confined inmates, this was equivalent to no recourse at all. By contrast, had Petitioner been incarcerated in the Fourth or Ninth Circuits, the federal courts would have considered his circumstances as compared to those of the general prison population; other circuits (particularly the Second) likely would have undertaken a consideration of various factors

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[13] This Court has recognized that impartial review committees created under state law can be an important part of an inmate's procedural due process protections. *See Wolff*, 418 U.S. at 571; *see also, e.g., Griffin*, 112 F.3d at 708-09 (assuming that inmates have a state court remedy for violations of state regulations governing administrative custody).

[14] This situation is especially critical given the effect of solitary confinement, a typical condition in prison segregation systems, on inmates' mental conditions. This effect is so extreme that it has been characterized as a syndrome. *See* Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J.L. & Pol'y 325, 333-38 (2006). Confinement with one or two others may be just as, if not more, damaging. *See id.* at 357-58; *see also Lekas v. Briley*, 405 F.3d 602, 611 n.5 (7th Cir. 2005) (noting that confinement in a small space with two other cellmates was arguably worse than solitary confinement).

including the duration of Petitioner's confinement and a comparison of his conditions with those of inmates inside and outside segregated custody.

Unless this Court clarifies its position, BOP officials in some circuits will continue to be able to effect an end-run around the procedural protections mandated by their own, currently unenforceable, regulations on administrative and disciplinary detention. Under the current system, officials in some circuits can place an inmate in segregation based on nonmeritorious reasons without the possibility of any recourse by the inmate, while federal inmates in other circuits will have access to relief from the courts. This case, where prison officials used a pending investigation as a pretext for Petitioner's ten-month stay in administrative segregation for an offense carrying a fifteen-day disciplinary segregation penalty, is a concrete example of how *Sandin*'s current ambiguities may be exploited.[15] This type of abuse does not appear to be isolated; another FCI Allenwood inmate averred that, although he was never charged with any infraction, he was kept in administrative segregation for two years and denied all visitation rights. *See* Pl.'s Response, Ex. 3 (Aff. of E. Gilchrist & Decl. of E. Gilchrist).

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[15] Moreover, as discussed above, prison officials *never* asserted, either while Petitioner was held in administrative segregation or during any of the lower court proceedings, that there was any reason for Petitioner's continued segregated confinement after the conclusion of the SIS investigation with no finding of wrongdoing.

Uniformity throughout the federal prison system also is important for prison administrators, who currently have little or conflicting guidance on whether they are violating an inmate's due process rights. The confusion created by the circuit split invites abuse in circuits with unclear guidelines and allows prison officials to make unwarranted placements in severe conditions in circuits with clear, but restrictive, baselines because inmates in those circuits are unlikely ever to secure relief. Such a system also makes administration inefficient, as prison officials cannot look to procedures in other prisons outside their circuit to decide best practices in prison administration — accepted practices in one circuit can violate due process in a neighboring one. *See, e.g.*, *Colon*, 215 F.3d at 232, 233 (observing that "[t]his is a context in which a high degree of certainty is extremely desirable" and that state law enforcement officials "believe that by clarifying this unsettled area of the law, such a ruling would provide a welcome resolution to what has become a vexing problem") (internal quotation marks omitted). This variation is inefficient and unworkable in managing a nationwide prison system governed by supposedly uniform regulations.[16]

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[16] Indeed, this pervasive lack of uniformity is one of the perceived problems with the *Hewitt* regime that this Court sought to remedy in *Sandin*. *See* 515 U.S. at 482 (observing that one of *Hewitt*'s "undesirable effects" was that "it create[d] disincentives for States to codify prison management procedures in the interest of uniform treatment" and that guidelines were necessary to, among other things, "confine the authority of prison personnel in order to avoid widely different treatment of similar incidents").

Finally, as this Court well knows, prisoner litigation makes up a large part of federal courts' workloads. Prisoner petitions constituted approximately twenty percent of the federal courts' caseload for the year ending March 31, 2007. Office of Judges' Programs Statistics Div., Admin. Office of the U.S. Courts, Annual Report of the Director: Judicial Business of the United States Courts, Tables C-3, C-4 (Mar. 31, 2007). Petitions involving prison conditions and civil rights made up slightly more than forty percent of the total prisoner petitions. *Id.* A more uniform approach to prisoners' liberty interests would increase both the fairness and efficiency of the lower courts' decision-making. *See generally* Edwards, *supra*, at 1568-69. While the facts of each case would still need to be analyzed, if the test were clear and uniform, lower courts would better be able to decide when a liberty interest is triggered.

* * * * *

In sum, lower court case law regarding when a federal inmate in administrative segregation possesses a liberty interest is in disarray. The court below, in particular, has not revisited its restrictive test in this area despite this Court's recent decision in *Wilkinson*. As a result, the scope of Petitioner's due process rights was less than that of similarly-situated inmates in other circuits. This case squarely presents the question whether such restrictive readings of this Court's precedent are appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 31, 2008

APPENDIX A

DLD-76 NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-3992

JASON WILSON,

Appellant

v.

WARDEN KAREN HOGSTEN; TROY WILLIAMSON; LT. LYONS; LT. FELTMAN; LT. CLARKSON; LT. HEPNER, MR. BUCK; DR. BONNER; JOHN DOE

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 06-cv-00109)
District Judge: Honorable Richard P. Conaboy

Submitted for Possible Dismissal Under 28 U.S.C. § 1915(e)(2)(B) or Summary Action Under Third Circuit LAR 27.4 and IOP 10.6

Before: BARRY, CHAGARES AND NYGAARD, CIRCUIT JUDGES.

(Opinion Filed: March 14, 2008)

OPINION

PER CURIAM

This is an appeal from the District Court's dismissal of Jason Wilson's complaint. For the following reasons, we will summarily affirm. See Third Circuit L.A.R. 27.4 and I.O.P. 10.6.

In January 2006, Appellant, a federal prisoner incarcerated in Pennsylvania, initiated a pro se Bivens action against various prison authorities at the Federal Correctional Institute in Allenwood (FCI-Allenwood).[1] Appellant's amended complaint contended that defendants violated his First, Fourth, Sixth, Eighth and Fourteenth Amendment rights by placing him in the prison's Special Housing Unit (SHU) on administrative detention status without following proper procedures. Prison officials placed Wilson in the SHU pending the outcome of an internal investigation concerning a magazine confiscated from Wilson's locker. Specifically, Wilson claimed that he was never provided with: 1) an administrative detention order as mandated by the Bureau of Prison (BOP) regulations; 2) an opportunity to appear before the Segregation Review Board (SRO); and 3) a psychological assessment

[1] In Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court recognized a private cause of action to recover damages against a federal agent for violations of constitutional rights.

despite a history of mental and emotional problems. Wilson alleged that when he inquired about the status of the investigation and attempted to file an administrative grievance, prison officials did not provide him with the proper forms and threatened him with misconduct charges. Wilson sought compensatory and punitive damages as well as injunctive relief. On September 26, 2007 the District Court granted summary judgment to the defendants on all claims, and Wilson filed a timely notice of appeal in this Court.

We exercise plenary review over the District Court's grant of Appellee's motion for summary judgment. See Whitfield v. Radian Guar., Inc., 501 F.3d 262, 265 (3d Cir. 2007). We apply the same standard in reviewing a motion for summary judgment as the District Court. Id. A motion for summary judgment should be granted only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

Wilson's complaint that he was kept in the SHU during the pendency of the ten-month internal investigation, and for ten weeks afterward, is not a cognizable constitutional claim.[2] In Sandin v.

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[2] Under the Prison Reform Litigation Act, a prisoner must exhaust "such administrative remedies as are available[.]" 42 U.S.C. §1997e(a). In the present case, the District Court determined that there were issues of material fact in dispute as to the exhaustion requirement and therefore chose not to resolve the issue. See Ray v. Kertes, 285 F.3d 287, 292 (3d Cir. 2002) (PLRA's exhaustion requirement does not act as a jurisdictional bar).

Conner, 515 U.S. 472 (1995), the United States Supreme Court acknowledged that state prison regulations may create liberty interests protected by the Due Process Clause. However, "these [liberty] interests will be generally limited to freedom of restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Sandin, 515 U.S. at 483-84.[3] We assume that the federal government may conceivably also confer such liberty interests on prisoners. See Crowder v. True, 74 F.3d 812, 815 (7th Cir. 1996).

Here, however, the District Court correctly determined that Wilson's confinement in administrative segregation did not implicate a liberty interest. As noted by the District Court, Wilson was the subject of an internal investigation and there was a need for his confinement in the SHU until November 2005. The subsequent ten-week period of confinement, beginning after the end of the investigation and prior to Wilson's transfer to a different facility in February 2006, also did not transform the entire detention into the atypical and significant hardship contemplated in Sandin. See Griffin v. Vaughn, 112 F.3d 703, 706 (3d Cir. 1997) (holding that a Pennsylvania prisoner's confinement

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[3] It is important to note that Wilson is a federal prisoner and therefore his case is governed by the Due Process Clause of the Fifth Amendment. See Crowder v. True, 74 F.3d 812, 814-15 (7th Cir. 1996).

in administrative segregation for 15 months did not implicate a liberty interest). Therefore, the confinement in SHU and the lack of a formal administrative detention order did not rise to the level of a constitutional violation.

Further, Wilson's reliance on BOP regulations is misplaced. "The central teaching of Sandin is that a state statute or regulation conferring a right is not alone enough to trigger due process." Id. at 708. In any event, the forms and affidavits submitted by the Defendants indicate that Wilson received psychological assessments and SRO reviews.

Wilson alleged that his placement in the SHU and subsequent deprivation of procedural rights constituted cruel and unusual punishment under the Eighth Amendment. He failed to raise any genuine issues of material fact as to the claim, however.[4] Specifically, Wilson did not plead any facts in his complaint which might lead a court to believe that he has been deprived of "the minimal civilized measures of life's necessities." Id. at 709.

Finally, the District Court properly granted summary judgment for the wardens of FCI-Allenwood. Wilson pled only that the wardens failed to take disciplinary action against prison officials to curb "the known pattern of the staffs [sic] deliberate indifferent to correct procedure". As stated above, none of the claims against lower level prison officials is meritorious. Therefore, even if a respondeat

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[4] Wilson does not state how defendants violated his First, Fourth, Sixth or Fourteenth Amendment rights.

superior theory were available, Appellee's motion for summary judgment was properly granted.[5]

Accordingly, because this appeal presents us with no substantial question, we will summarily affirm the decision of the District Court. See Third Circuit L.A.R. 27.4 and I.O.P. 10.6.

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[5] Most jurisdictions do not recognize respondeat superior liability in a Bivens action. See Young v. Quinlan, 960 F.2d 351, 358 n.14 (3d Cir. 1992) (superseded by statute on other grounds).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

JASON S. WILSON,	:	
Plaintiff	:	CIVIL
v.	:	NO. 3:CV-06-109
	:	
WARDEN KAREN	:	(Judge Conaboy)
HOGSTEN, ET AL.,	:	
Defendants	:	

MEMORANDUM
Background

Jason Wilson, an inmate presently confined at the Federal Correctional Institution, Loretto, Pennsylvania (FCI-Loretto), initiated this *pro se* Bivens[1] civil rights action. By order dated June 7, 2006, Plaintiff was granted leave to submit an amended complaint.

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[1] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). Bivens stands for the proposition that "a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal question jurisdiction of the district court to obtain an award of monetary damages against the responsible federal official." Butz v. Economou, 438 U.S. 478, 504 (1978).

Named as Defendants in the Amended Complaint (Doc. 24) are the following employees at the Plaintiff's prior place of confinement, the Allenwood Federal Correctional Institution, White Deer, Pennsylvania (FCI-Allenwood): Warden Karen Hogsten; former Warden Troy Williamson; Special Investigative Services (SIS) Supervisor James Lyons; Lieutenant James Hepner; SIS Lieutenant Brian Feltman; former Lieutenant Scott Clarkson; Staff Psychologist Ronald Bonner; and Correctional Counselor Matthew Buck.

Plaintiff's Amended Complaint contends that the Defendants violated his rights under the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments. Wilson arrived at FCI-Allenwood on January 23, 2003. On April 13, 2005, the Plaintiff was removed from general population and placed in the prison's Special Housing Unit (SHU) on administrative detention status pending the outcome of an internal investigation.

He was subsequently questioned by SIS Defendants Lyons and Feltman "about a magazine that was found in his locker." Doc. 24, ¶ 14. Wilson's initial contention is that he was never provided with an administrative detention order as mandated by Bureau of Prisons (BOP) regulations. It is next alleged that on May 14, 2005, after Plaintiff spent thirty (30) days in administrative detention, the Defendants acted improperly by failing to provide him with an opportunity to appear before the Segregation Review Official (SRO) and a "psychological assessment with a personal interview." Id. at ¶ 17. Furthermore, the Amended

Complaint maintains that throughout his ten (10) months[2] in administrative detention Wilson was never provided with an administrative detention order, opportunity to appear before the SRO[3] or a psychological assessment[4] with a personal interview.

During late July, 2005, Plaintiff states that he spoke with Lieutenant Clarkson regarding the status of the SIS investigation. Clarkson allegedly promised to ascertain the status of the investigation from Defendants Lyons and Feltman. About a week later, Clarkson purportedly informed Wilson that unless the prisoner admitted that a correctional officer gave him the magazine the SIS would let him rot in administrative detention. Plaintiff indicates that he told Clarkson that he had not gotten the magazine from a correctional officer.

On or about October 18, 2005, Plaintiff was again interviewed by SIS Lieutenant Lyons. After the interview concluded, Lyons allegedly told Wilson that the internal investigation was over. On November 21, 2005, the Plaintiff requested administrative grievance forms from Counselor

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[2] Wilson remained in the SHU until his transfer to FCI-Loretto on February 8, 2006.

[3] The Amended Complaint indicates that it was the responsibility of Defendants Clarkson and Hepner to provide him with an SRO hearing.

[4] Plaintiff indicates that Defendant Bonner failed to provide him with any psychological assessment despite the fact that such evaluations were mandated by BOP regulations and moreover, because Wilson had a documented history of mental and emotional problems.

Buck. Buck purportedly responded that he was not in possession of any forms at that time but would attempt to find out what was going on with the SIS investigation. Three (3) hours later, SIS Lieutenant Feltman threatened the Plaintiff with a misconduct charge if he pursued administrative relief.

On November 27, 2005, Buck informed the Plaintiff not to make waves or speak to anyone except SIS or Buck. Wilson notes that shortly after the Defendants were served with the Original Complaint, he was transferred from FCI-Allenwood into general population at FCI-Loretto. Wilson concludes that he was intentionally subjected to a prolonged unwarranted SHU detention in an effort to compel him to provide information sought by the SIS. The Amended Complaint seeks compensatory and punitive damages as well as injunctive and declaratory relief.

Presently pending is the Defendants' motion to dismiss, or in the alternative, for summary judgment. See Doc. 58. The motion has been briefed and is ripe for consideration.

Discussion

Defendants argue that they are entitled to an entry of dismissal or summary judgment on the grounds that: (1) this Court lacks subject matter jurisdiction; (2) Wilson failed to exhaust his available administrative remedies; (3) the claims against Defendants Hogsten and Williamson are improperly premised on a theory of *respondeat superior*; (4) Plaintiff cannot recover compensatory damages for

emotional and psychological injuries; and (5) the Defendants are entitled to qualified immunity.

Standard of Review

The Defendants' motion is accompanied by evidentiary materials [documents] outside the pleadings which are relevant for purposes of both determining the issue of administrative exhaustion as well as their alternative arguments. Rule 12(b) provides in part as follows:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Fed. R. Civ. P. 12(b). The Court will not exclude the evidentiary materials [documents] accompanying the Defendants' motion. Thus, their motion will be treated as solely seeking summary judgment.

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. "[T]he standard [(for granting summary judgment)] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a) . . . ."

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, (1986).

The moving party bears the initial responsibility of stating the basis for its motion and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. The moving party can discharge that burden by "'showing' . . . that there is an absence of evidence to support the nonmoving party's case." Celotex, supra, 106 S.Ct. at 2553 and 2554. Once the moving party

has satisfied its burden, the nonmoving party must present "affirmative evidence" to defeat the motion, consisting of verified or documented materials. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986). Issues of fact are "genuine only if a reasonably jury, considering the evidence presented could find for the nonmoving party." Childers v. Joseph, 842 F.2d 689, 693-94 (3d Cir. 1988). Only disputes over facts that might affect the outcome of the suit will preclude the entry of summary judgment. Id. In evaluating a motion for summary judgment, the entire record must be examined in the light most favorable to the nonmoving party.

Subject Matter Jurisdiction

Defendants initially contend that "any Bivens claim against any Defendants sued in their official capacities should be dismissed" for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). Doc. 66, p. 15.

Absent explicit waiver of sovereign immunity, the United States is generally immune from suit. United States v. Mitchell, 445 U.S. 535, 538 (1980). This "immunity is jurisdictional in nature," FDIC v. Meyer, 510 U.S. 471, 475 (1994), and extends to government agencies and employees. Antol v. Perry, 82 F.3d 1291, 1296 (3d Cir. 1996). "Congress has not waived sovereign immunity for damages claims for constitutional violations." Germosen v. Reno, Civil No. 99-1268, slip op. at 13 (M.D. Pa. Sept. 20, 2000) (Vanaskie, C.J.).

Consequently, this Court agrees that the Amended Complaint to the extent that it is raising

Bivens claims against the Remaining Defendants in their official capacities is subject to dismissal for lack of jurisdiction.

Administrative Exhaustion

The Defendants' second argument contends that Wilson failed to exhaust available administrative remedies with respect to any of the claims raised in the Amended Complaint. See Doc. 66, p. 16.

> 42 U.S.C. § 1997e(a) provides as follows:
>
> No action shall be brought with respect to prison conditions under Section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

Section 1997e(a) requires administrative exhaustion "irrespective of the forms of relief sought and offered through administrative avenues." Porter v. Nussle, 122 S.Ct. 983, 992 (2002); Booth v. Churner, 532 U.S. 731, 741 n. 6 (2001). Claims for monetary relief are not excused from the exhaustion requirement. Nyhuis v. Reno, 204 F.3d 65, 74 (3d Cir. 2000). Dismissal of an inmate's claim is appropriate when a prisoner has failed to exhaust his available administrative remedies before bringing a civil rights action. Ahmed v. Sromovski, 103 F. Supp. 2d 838, 843 (E.D. Pa. 2000). "[E]xhaustion must occur prior to filing suit, not while the suit is pending." Tribe v. Harvey, 248 F.3d 1152, 2000 WL 167468, *2 (6th Cir.

2000) (citing Freeman v. Francis, 196 F.3d 641, 645 (6th Cir. 1999)).

An inmate's failure to comply with the administrative exhaustion requirement constitutes an affirmative defense. See e.g., Massey v. Helman, 196 F.3d 727, 735 (7th Cir. 2000), cert. denied, 532 U.S. 1065 (2001); Jenkins v. Haubert, 179 F.3d 19, 29 (2nd Cir. 1999); Robinson v. Dalton, 107 F.3d 1018, 1021 (3d Cir. 1997) (holding, in the context of a Title VII case, that failure to exhaust administrative remedies is an affirmative defense). Consequently, a prisoner does not have to allege in his complaint that he has exhausted administrative remedies. Ray v. Kertes, 285 F.3d 287 (3d Cir. 2002). Rather, it is the burden of a defendant asserting the defense to plead and prove it. Id.; Williams v. Runyon, 130 F.3d 568, 573 (3d Cir. 1997); Charpentier v. Godsil, 937 F.2d 859 (3d Cir. 1991); Fed R. Civ. P. 8(c).

The BOP has established a multi-tier Administrative Remedy Program whereby a federal prisoner may seek review of any aspect of his imprisonment.[5] See 28 C.F.R. §§ 542.10-542.19

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[5] Matters excluded from this program are set forth at 28 C.F.R. § 542.12, which states as follows:

> (a) An inmate may not use this Program to submit a Request or Appeal on behalf of another inmate. This program is intended to address concerns that are personal to the inmate making the Request or Appeal, but shall not prevent an inmate from obtaining assistance in preparing a Request or Appeal, as provided in § 542.16 of this part.
> (b) Requests or Appeals will not be accepted under the Administrative Remedy Program for claims for which other administrative procedures have been established, including

(1998). "This program applies to all inmates confined in institutions operated by the Bureau of Prisons, to inmates designated to Community Corrections Centers (CCCs) under Bureau of Prisons' responsibility, and to former inmates for issues that arose during their confinement but does not apply to inmates confined in other non-federal facilities." Id. at § 542.10.

The program provides that, with certain exceptions, ". . . an inmate shall first present an issue of concern informally to staff, and staff shall attempt to informally resolve the issue before an inmate submits a Request for Administrative Remedy."[6] Id. at § 542.13(a). Next, if informal resolution fails, the inmate must submit "a formal written Administrative Remedy Request, on the appropriate form (BP-9)," within 20 "calendar days following the date on which the basis for the Request occurred." Id. at § 542.14(a). If a valid reason for delay is given, an extension of the filing time may be granted. Id. at

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tort claims, Inmate Accident Compensation claims, and Freedom of Information or Privacy Act requests. Staff shall inform the inmate in writing of the appropriate procedure if the Request or Appeal is not acceptable under the Administrative Remedy Program.

[6] CCC inmates are not required to seek informal resolution. Id. at § 542.13(b). Informal resolution is not required for those matters identified in § 542.14(d), which include sensitive issues and DHO, Control Unit, and Controlled housing status appeals. Id. Additionally, inform resolution may be waived in individual cases at the discretion of either the Warden or the institution Administrative Remedy Coordinator "when the inmate demonstrates an acceptable reason for bypassing informal resolution." Id.

542.14(b). The Warden has 20 calendar days from the date the Request or Appeal is filed in which to respond. Id. at § 542.18.

If not satisfied with the Warden's response, an inmate may appeal on the appropriate form (BP-10) to the Regional Director with 20 calendar days of the date the Warden signed the response. Id. at § 542.15. Finally, if the inmate is dissatisfied with the Regional Director's response, that decision may then be appealed on the appropriate form (BP-11) to the General Counsel within 30 calendar days from the date the Regional Director signed the response. Id. "When the inmate demonstrates a valid reason for delay, these time limits may be extended." Id. The Regional Director has 30 calendar days to respond and the General Counsel has 40 calendar days in which to respond. Id. at § 542.18.

The response time provided for at each level may be extended in writing "once by 20 days at the institution level, 30 days at the regional level, or 20 days at the Central Office level." Id. Additionally, "[i]f the inmate does not receive a response within the time allotted for reply, including extension, the inmate may consider the absence of a response to be a denial at that level." Id.

Defendants contend that "Wilson has never submitted any administrative remedies while in the custody of the BOP." Doc. 66, p. 19. Their supporting brief notes that Plaintiff did not submit a written request to Counselor Buck.[7] The Defendants

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[7] Defendants acknowledge that Plaintiff made a verbal request

add that the Plaintiff's argument that he was hampered in his attempt to seek administrative relief by Defendants Buck and Feltman is questionable.

In his Amended Complaint, Wilson sets forth factual averments which could provide a proper basis as to why he should be excused from the exhaustion requirement. Specifically, Plaintiff alleges that when he attempted to initiate an administrative grievance, he was informed by Counselor Buck that no forms were available. Shortly, thereafter, Lieutenant Feltman allegedly threatened Wilson with an institutional misconduct charge if he sought administrative relief.

A review of the record shows that there are issues of material fact in dispute as to whether the Plaintiff's claims relating to SHU placement should be dismissed for non-exhaustion. Accordingly, the Defendants' request for summary judgment on the basis of non-exhaustion with respect to said claims will be denied.

Respondeat Superior

The third summary judgment argument contends that Wardens Hogsten and Williamson are entitled to summary judgment because Wilson has not alleged any direct involvement by them in the

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for information regarding his SHU status and the status of the investigation to Buck. However, when Buck responded that the investigation was proceeding, Wilson did not make a written request to pursue the matter via the administrative remedy process.

alleged constitutional violations. Consequently, Defendants maintain that the Plaintiff is improperly attempting to establish liability against the Warden and former Warden solely on a theory of *respondeat superior.*

A plaintiff, in order to state an actionable civil rights claim, must plead two essential elements: (1) that the conduct complained of was committed by a person acting under color of law, and (2) that said conduct deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States. Groman v. Township of Manalapan, 47 F.3d 628, 638 (3d Cir. 1995); Shaw by Strain v. Strackhouse, 920 F.2d 1135, 1141-42 (3d Cir. 1990).

Civil rights claims brought cannot be premised on a theory of *respondeat superior.* Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988). Rather, each named defendant must be shown, via the complaint's allegations, to have been personally involved in the events or occurrences which underlie a claim. See Rizzo v. Goode, 423 U.S. 362 (1976); Hampton v. Holmesburg Prison Officials, 546 F.2d 1077 (3d Cir. 1976). As explained in Rode:

> A defendant in a civil rights action must have personal involvement in the alleged wrongs . . . . [P]ersonal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence. Allegations of participation or actual knowledge and acquiescence, however, must be made with appropriate particularity.

Rode, 845 F.2d at 1207.

Wilson's Amended Complaint alleges that the "failure of defendants Hogsten and Williamson to take disciplinary or other action to curb the known pattern of the staffs [sic] deliberate indifference to correct procedure in accordance with policy and law" was the proximate cause of the constitutional violations. Doc. 24, ¶ 34.

The Amended Complaint contains no allegations that either Williamson or Hogsten was involved in, or had knowledge of, any decision relating to Plaintiff's placement in the SHU or the purported subsequent denials of psychological assessments and SRO reviews. There is also no indication that either Warden was even aware that Wilson was being housed in the SHU. Furthermore, prison inmates do not have a constitutionally protected right to a grievance procedure. See Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 137-38 (1977). Accordingly, Wilson cannot establish liability against Williamson and Hogsten based on any failure by them to grant relief or take corrective action with respect to any internal complaints raised by the Plaintiff.

Since Plaintiff's assertions regarding ex-Warden Williamson and Warden Hogsten are solely based upon their supervisory capacities, they are insufficient for establishing civil rights liability under the standards developed in Durmer, Jones, and Capone. Accordingly, because there are no allegations that those two Defendants had any direct involvement or acquiescence in the alleged

constitutional misconduct, they are entitled to an entry of summary judgment.

Emotional Injury

Defendants next maintain that Wilson is not entitled to recover monetary damages for mental anguish or emotional injury. The Defendants correctly note that the Amended Complaint seeks to recover six million dollars for emotional and psychological injuries sustained as a result of the Plaintiff's ten (10) month detention in the SHU. See Doc. 24, p. 8, ¶ C(1).

42 U.S.C. § 1997e(e) provides that "[n]o federal civil action may be brought by a prisoner confined in a jail, prison or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." In Allah v. Al-Hafeez, 226 F.3d 247,250 (3d Cir. 2000), the United States Court of Appeals for the Third Circuit recognized that where a plaintiff fails to allege actual injury, Section 1997e(e) bars recovery of compensatory damages. However, the Court of Appeals added that an inmate alleging a violation of his constitutional rights may still pursue the action to recover nominal and/or punitive damages even in the absence of compensable harm.

Under the standards announced in Allah, Wilson's request for compensatory damages for emotional and psychological injuries caused by his ten (10) month SHU confinement is barred by Section 1997e(e). However, the Amended Complaint's request for punitive damages based upon his SHU confinement is not precluded. See

Ostrander v. Horn, 145 F. Supp. 2d 614, 619 (M.D. Pa. 2001).

Qualified Immunity

Defendants next contend that they are entitled to qualified immunity because Plaintiff's placement in the SHU for ten (10) months does not amount to an atypical and significant hardship and Wilson was not subjected to inhumane conditions while in the SHU.

Qualified immunity is an affirmative defense which must be pleaded by the defendant official. Id.; Verney v. Pennsylvania Turnpike Comm'n, 881 F. Supp. 145, 149 (M.D. Pa. 1995). In Harlow v. Fitzgerald, 457 U.S. 800 (1982), the United States Supreme Court held "that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 818; Sherwood v. Mulvihill, 113 F.3d 396, 398-99 (3d Cir. 1997); Showers v. Spangler, 957 F. Supp. 584, 589 (M.D. Pa. 1997). It has also been held that "qualified immunity is coextensive for suits brought against state officials under 42 U.S.C. § 1983 (1982), and for suits brought directly under the Constitution against federal officials." People of Three Mile Island v. Nuclear Regulatory Commissioners, 747 F.2d 139, 144 n.9 (3d Cir. 1984) (citing Butz v. Economou, 438 U.S. 478, 504 (1978)).

The United States Supreme Court in Saucier v. Katz, 533 U.S. 194 (2001), established a two part test

for analyzing qualified immunity claims. See also Curley v. Klem, 298 F.3d 271 (3d Cir. 2002); Bennett v. Murphy, 274 F.3d 133 (3d Cir. 2002). The initial inquiry in a qualified immunity examination is whether "the facts taken in the light most favorable to the plaintiff show a constitutional violation." Bennett, 274 F.3d at 136. The second prong requires a determination as to whether the constitutional right at issue was clearly established. If so, then a court must inquire as to "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Saucier, 533 U.S. at 201. A determination that the conduct violated a clearly established constitutional right precludes the granting of qualified immunity.

Defendants' first contention is that Plaintiff's placement in the SHU does not rise to the level of a constitutional violation as required under the first prong of Saucier. They argue that a viable due process violation has not been raised because Plaintiff did not possess a liberty interest in remaining in general population.

The Fourteenth Amendment of the United States Constitution provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." The Supreme Court has mandated a two-part analysis of a procedural due process claim: first, "whether the asserted individual interests are encompassed within the . . . protection of 'life, liberty or property[,]' " and second, "if protected interests are implicated, we must then decide what procedures constitute 'due process of law.' " Ingraham v. Wright, 430 U.S. 651,

672 (1977). If there is no protected liberty or property interest, it is obviously unnecessary to analyze what procedures were followed when an alleged deprivation of an interest occurred.

In Sandin v. Conner, 515 U.S. 472 (1995), the United States Supreme Court held that while under certain circumstances, states may create liberty interests protected by the Due Process Clause,

> these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force . . ., nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

Id. at 484 (citations omitted). The Court of Appeals for the Third Circuit in Griffin v. Vaughn, 112 F.3d 703 (3d Cir. 1997), addressed an action initiated by a Pennsylvania state inmate who had been held in administrative custody for a prolonged period. The Court applied Sandin and concluded that placement without any type of due process hearing for a period of fifteen (15) months was not an atypical and significant hardship. Furthermore, the inmate's "commitment to and confinement in administrative custody did not deprive him of a liberty interest and that he was not entitled to procedural due process protection." Id. at 708. It added that prolonged confinement in administrative custody was not cruel and unusual punishment. Id. at 709. Finally, an

inmate placed in administrative custody pursuant to a legitimate penological reason could "be required to remain there as long as that need continues." Id.

It is undisputed that following the discovery of a magazine in Plaintiff's locker, the prisoner became involved in an SIS investigation into alleged staff and inmate misconduct.[8] This Court is satisfied that those undisputed circumstances provided a legitimate need for Plaintiff's initial placement in the SHU on administrative custody status pending the outcome of the SIS investigation. Based upon that finding, the failure to provide Wilson with an administrative detention order does not rise to the level of a constitutional violation under the standards announced in Sandin and Griffin. Thus, the Defendants' summary judgment motion will be granted with respect to the extent that Plaintiff challenges his initial placement in the SHU and the alleged failure to issue an administrative detention order.

A review of the record shows that the SIS investigation ended on November 17, 2005[9] and that Plaintiff was transferred to FCI-Loretto on February 8, 2006. Clearly there was a continuing legitimate need for the Plaintiff's SHU confinement until November, 2005. Furthermore, the Court finds that

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[8] The investigation regarded the introduction and circulation of pornographic magazines among the inmate population. The investigation ultimately concluded that Wilson was not involved in any illegal activity.

[9] See Doc. 62, Exhibit 2, ¶ 7.

the additional period of time spent by Wilson in the SHU prior to his transfer (approximately ten (10) weeks) was not of such magnitude to constitute the atypical and significant hardship contemplated under Sandin.

Wilson is also contending that the Defendants failed to provide him with SRO reviews and psychological assessments, all which are mandated by BOP regulations.[10]

As noted earlier, the SHU placement at issue was only temporary, lasting only a period of ten (10) months. With respect to the allegations that Wilson was not provided with mandated period SRO reviews and psychological assessments, the Defendants have submitted a sworn declaration by Lieutenant Clarkson who acknowledges that from December, 2004 – September, 2005, he was the SRO official in the SHU.[11] See Doc. 67, Exhibit 4, ¶ 1. Clarkson also admits that BOP regulations provide that SHU inmates must be provided with periodic reviews by the SRO officer. Clarkson states that Wilson was provided "with the mandatory SRO reviews and psychological assessments while he was housed in the SHU." Id. at ¶ 6. Attached to Clarkson's

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[10] Plaintiff makes no claim that he was subjected to inhumane conditions of confinement while housed in the SHU. Rather, he contends that the Defendants failed to follow their own internal regulations by providing him the periodic reviews and psychological assessments which he was entitled to under BOP regulations.

[11] Plaintiff was in the SHU from April, 2005 until February, 2006.

declaration are copies of institutional records indicating that thirty (30) day status reviews were provided to the Plaintiff throughout his SHU stay. See id. at Attachment 2.

Defendant Hepner has also submitted a declaration under penalty of perjury stating that he served as the SRO from September 2005 until June, 2006. See id. at Exhibit 5, ¶ 3. Hepner similarly states that Wilson was provided with all mandated SRO reviews and psychological assessments during the period that he served as the SRO official. Copies of those relevant completed SRO review forms are likewise attached to Hepner's declaration.

The Defendants have also submitted a sworn declaration by Doctor Bonner who states that he has been employed as a psychologist at FCI-Allenwood since October, 1997. See id. at Exhibit 6, ¶ 1. Bonner avers that the Plaintiff was given eleven (11) psychological assessments while housed in the SHU. In addition Bonner indicates that he regularly spoke with Wilson while making weekly rounds in the SHU. Furthermore, Doctor Bonner provided Wilson with six (6) separate counseling sessions while the Plaintiff was housed in the SHU. Copies of the relevant reviews have been submitted for consideration. See Doc. 64.

Based upon the undisputed supporting documents submitted by the Defendants, this Court is satisfied that Wilson was provided with all mandated SRO reviews and psychological assessments during his ten month SHU detention. Summary judgment will be granted in favor of the

Defendants with respect to said claims. An appropriate Order will enter.

S/Richard P. Conaboy
RICHARD P. CONABOY
United States District Judge

DATED: SEPTEMBER 26, 2007

THE UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

JASON S. WILSON,	:	
Plaintiff	:	CIVIL
v.	:	NO. 3:CV-06-109
	:	
WARDEN KAREN	:	(Judge Conaboy)
HOGSTEN, ET AL.,	:	
Defendants	:	

ORDER

AND NOW, THIS 26TH DAY OF SEPTEMBER, 2007, in accordance with the accompanying Memorandum, IT IS HEREBY ORDERED THAT:

1. Defendants' motion to dismiss or in the alternative for summary judgment (Doc. 58) is granted.

2. The Clerk of Court is directed to close the case.

3. Any appeal from this Order will be deemed frivolous, without probably cause, and not taken in good faith.

S/Richard P. Conaboy
RICHARD P. CONABOY
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-3992

JASON WILSON,

Appellant

v.

WARDEN KAREN HOGSTEN; TROY WILLIAMSON; LT. LYONS; LT. FELTMAN; LT. CLARKSON; LT. HEPNER; MR. BUCK; DR. BONNER; JOHN DOE

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 06-cv-00109)
District Judge: Honorable Richard P. Conaboy

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, and NYGAARD,* Circuit Judges

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* Judge Nygaard's vote is limited to panel rehearing only.

SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing en banc filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing en banc is DENIED.

BY THE COURT:

/s/Maryanne Trump Barry
Circuit Judge

Dated: June 4, 2008
par/cc: W.S.B., Esq.
M.A.S., Esq.
J.W.

APPENDIX D

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 C.F.R. § 541.22

§ 541.22 Administrative detention.

Administrative detention is the status of confinement of an inmate in a special housing unit in a cell either by self or with other inmates which serves to remove the inmate from the general population.

(a) *Placement in administrative detention.* The Warden may delegate authority to place an inmate in administrative detention to Lieutenants. Prior to the inmate's placement in administrative detention, the Lieutenant is to review the available information and determine whether the inmate's placement in administrative detention is warranted. The Warden may place an inmate in administrative detention when the inmate is in holdover status (i.e., en route to a designated institution) during transfer, or is a new commitment pending classification. The Warden may also place an inmate in administrative detention when the inmate's continued presence in the general population poses a serious threat to life, property, self, staff, other inmates or to the security or orderly running of the institution and when the inmate:

(1) Is pending a hearing for a violation of Bureau regulations;

(2) Is pending an investigation of a violation of Bureau regulations;

(3) Is pending investigation or trial for a criminal act;

(4) Is pending transfer;

(5) Requests admission to administrative detention for the inmate's own protection, or staff determines that admission to or continuation in administrative detention is necessary for the inmate's own protection (see § 541.23); or

(6) Is terminating confinement in disciplinary segregation and placement in general population is not prudent. The Segregation Review Official is to advise the inmate of this determination and the reasons for such action.

(i) Except for pretrial inmates or inmates in a control unit program, staff ordinarily within 90 days of an inmate's placement in post-disciplinary detention shall either return the inmate to the general inmate population or request regional level assistance to effect a transfer to a more suitable institution.

(ii) The Assistant Director, Correctional Programs Division, shall review for purpose of making a disposition, the case of an inmate not transferred from post-disciplinary detention within the time frame specified in paragraph (a)(6)(i) of this section.

(iii) Staff in a control unit will attempt to adhere to the 90-day limit for an inmate's placement in post-disciplinary detention. Because security needs required for an inmate in a control unit program may not be available outside of post-discipline detention, the Warden may approve an extension of this placement upon determining in

writing that it is not practicable to release the inmate to the general inmate population or to effect a transfer to a more suitable institution.

(iv) The appropriate Regional Director and the Assistant Director, Correctional Programs Division, shall review (for purpose of making a disposition) the case of an inmate in a control unit program not transferred from post-disciplinary detention within the 90-day time frame specified in paragraph (a)(6)(iii) of this section. A similar, subsequent review shall be conducted every 60-90 days if post-disciplinary detention continues for this extended period.

(b) *Administrative detention order detailing reasons for placement.* The Warden shall prepare an administrative detention order detailing the reasons for placing an inmate in administrative detention, with a copy given to the inmate, provided institutional security is not compromised thereby. Staff shall deliver this order to the inmate within 24 hours of the inmate's placement in administrative detention, unless this delivery is precluded by exceptional circumstances. An order is not necessary for an inmate placed in administrative detention when this placement is a direct result of the inmate's holdover status.

(c) *Review of inmates housed in administrative detention.* (1) Except as otherwise provided in paragraphs (c)(2) and (c)(3) of this section, the Segregation Review Official will review the status of inmates housed in administrative detention. The SRO shall conduct a record review within three work

days of the inmate's placement in administrative detention and shall hold a hearing and formally review the status of each inmate who spends seven continuous days in administrative detention, and thereafter shall review these cases on the record (in the inmate's absence) each week, and shall hold a hearing and review these cases formally at least every 30 days. The inmate appears before the SRO at the hearing unless the inmate waives the right to appear. A waiver may be in writing, signed by the inmate, or if the inmate refuses to sign a waiver, it shall be shown by a memorandum signed by staff and witnessed by a second staff member indicating the inmate's refusal to appear at the hearing. Staff shall conduct a psychiatric or psychological assessment, including a personal interview, when administrative detention continues beyond 30 days. The assessment, submitted to the SRO in a written report, shall address the inmate's adjustment to surroundings and the threat the inmate poses to self, staff and other inmates. Staff shall conduct a similar psychiatric or psychological assessment and report at subsequent one-month intervals should detention continue for this extended period. Administrative detention is to be used only for short periods of time except where an inmate needs long-term protection (see § 541.23), or where there are exceptional circumstances, ordinarily tied to security or complex investigative concerns. An inmate may be kept in administrative detention for longer term protection only if the need for such protection is documented by the SRO. Provided institutional security is not compromised, the inmate shall receive at each formal review a written copy of the SRO's decision and the

basis for this finding. The SRO shall release an inmate from administrative detention when reasons for placement cease to exist.

(2) The Warden shall designate appropriate staff to meet weekly with an inmate in administrative detention when this placement is a direct result of the inmate's holdover status. Staff shall also review this type of case on the record each week.

(3) When an inmate is placed in administrative detention for protection, but not at that inmate's request, the Warden or designee is to review the inmate's status within two work days of this placement to determine if continued protective custody is necessary. A formal hearing is to be held within seven days of the inmate's placement (see § 541.23, Protection Cases).

(d) *Conditions of administrative detention.* The basic level of conditions as described in §541.21(c) for disciplinary segregation also apply to administrative detention. If consistent with available resources and the security needs of the unit, the Warden shall give an inmate housed in administrative detention the same general privileges given to inmates in the general population. This includes, but is not limited to, providing an inmate with the opportunity for participation in an education program, library services, social services, counseling, religious guidance and recreation. Unless there are compelling reasons to the contrary, institutions shall provide commissary privileges and reasonable amounts of personal property. An inmate in administrative detention shall be permitted to have a radio,

provided that the radio is equipped with ear plugs. Exercise periods, at a minimum, will meet the level established for disciplinary segregation and will exceed this level where resources are available. The Warden shall give an inmate in administrative detention visiting, telephone, and correspondence privileges in accordance with part 540 of this chapter. The Warden may restrict for reasons of security, fire safety, or housekeeping the amount of personal property that an inmate may retain while in administrative detention.

Supreme Court, U.S.
FILED
FEB 3 - 2009
OFFICE OF THE CLERK

No. 08-596

In the Supreme Court of the United States

JASON WILSON, PETITIONER

v.

KAREN HOGSTEN, WARDEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals and the district court erred in concluding that petitioner failed to allege a liberty interest protected under the Due Process Clause.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not published in the *Federal Reporter* but is reprinted in 269 Fed. Appx. 193. The opinion and order of the district court granting defendants' motion to dismiss or in the alternative for summary judgment (Pet. App. 7a-29a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 2008. A petition for rehearing was denied on June 4, 2008 (Pet. App. 30a-31a). On August 27, 2008, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including November 1, 2008. The petition for a writ of certiorari was

filed on October 31, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is currently serving a 108-month prison sentence for distribution of a controlled substance in violation of the federal narcotics laws. 12/7/06 Decl. of Joseph McCluskey ¶ 3; Def.'s Mot. to Dismiss, Exh. 1, at 2. His projected release date from federal custody is May 13, 2009. *Ibid.*

From January 28, 2003, through February 8, 2006, petitioner was incarcerated at the Federal Correctional Institution in Allenwood, Pennsylvania (FCI Allenwood). Pet. 2. On April 13, 2005, petitioner was removed from the general population at FCI Allenwood and placed on administrative detention status in that Institution's Special Housing Unit during an internal investigation of alleged misconduct by inmates and prison staff. Pet. App. 5a, 25a. The investigation concluded on November 17, 2005, and although petitioner was not found to have engaged in illegal activity, he remained in administrative detention pending his transfer to another federal correctional institution on February 8, 2006. *Id.* at 25a & n.8.

2. Federal regulations provide that inmates may be placed in administrative detention for a number of reasons. See 28 C.F.R. 541.22; Pet. App. 33a-38a. Under those regulations, administrative detention is appropriate when the inmate is "pending transfer" to another institution, "when the inmate is in holdover status (i.e., en route to a designated institution) during transfer," or when the inmate "is a new commitment pending classification." 28 C.F.R. 541.22(a) and (a)(1). Administrative detention is also warranted where, *inter alia*, the inmate

is involved in "an investigation of a violation of Bureau regulations." 28 C.F.R. 541.22(a)(2).

The regulations prescribe certain procedures that accompany placement of an inmate in administrative detention. 28 C.F.R. 541.22(b) and (c). When an inmate is so designated, prison officials must generally prepare and, if institutional security permits, deliver to the inmate an administrative detention order (ADO) detailing the reasons for the placement. 28 C.F.R. 541.22(b). A segregation review official (SRO) is required to review the inmate's status at specified intervals. 28 C.F.R. 541.22(c). If the inmate remains in administrative detention for longer than 30 days, prison officials must interview the inmate each month and prepare a report assessing his psychological condition. *Ibid.*

3. a. On January 17, 2006, petitioner filed a pro se complaint in the United States District Court for the Middle District of Pennsylvania naming various FCI Allenwood employees, respondents here. Pet. App. 7a-9a. The complaint alleged deprivations of petitioner's rights under the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution, as well as violations of federal Bureau of Prisons regulations, arising from his placement and experience in administrative detention. As relevant here, the complaint asserted that respondents violated petitioner's Fifth Amendment due process rights by failing to comply with their regulatory obligations to ensure that he received an ADO explaining the basis for his detention, periodic review of his status before the SRO, and monthly psychological evaluations. *Id.* at 8a-9a. The complaint, which named respondents in their individual and official capacities, sought millions of dollars in compensatory and punitive

damages as well as injunctive and declaratory relief. *Id.* at 10a.

b. The district court awarded summary judgment to respondents on various grounds. Pet. App. 7a-28a. In the portion of the decision at issue in this Court, the district court held that respondents were entitled to qualified immunity on petitioner's due process claim because petitioner's placement in administrative detention did not implicate a protected liberty interest. *Id.* at 22a-23a. The court concluded that, under the standard articulated in *Sandin* v. *Conner*, 515 U.S. 472 (1995), petitioner's ten-month placement in administrative detention did not constitute an "atypical and significant hardship * * * in relation to the ordinary incidents of prison life." Pet. App. 24a (quoting *Sandin*, 515 U.S. at 484). In the court's view, the "undisputed circumstance[]" that petitioner was implicated in an investigation of inmate and staff misconduct "provided a legitimate need" to place him in administrative detention while the investigation was underway. *Id.* at 25a. The court also reasoned that the approximately ten weeks that petitioner remained in administrative detention after the conclusion of the investigation "was not of such magnitude" to trigger due process protection under *Sandin*. *Id.* at 25a-26a. In support of that conclusion, the court cited the Third Circuit's decision in *Griffin* v. *Vaughn*, 112 F.3d 703 (1997), which held that an inmate's placement in administrative detention for 15 months did not constitute an atypical and significant hardship. Pet. App. 24a.

The district court thus reasoned that, because petitioner had failed to allege a protected liberty interest, there was no need to assess the constitutional adequacy of the procedures respondents provided. Pet. App. 24a. The court noted in rejecting petitioner's claims arising

from the federal regulations, however, that based on a review of the documentary evidence respondents offered in support of their motion for summary judgment, petitioner was in fact "provided with all mandated SRO reviews and psychological assessments during his ten month" period in administrative detention, including weekly status reviews and six psychological counseling sessions. *Id.* at 26a-27a.

4. The court of appeals affirmed the district court's judgment in a non-precedential, per curiam order. Pet. App. 1a-6a. The court of appeals agreed with the district court that because petitioner "was the subject of an internal investigation," there was "a need for his confinement" in administrative detention until the completion of that process. *Id.* at 4a. The court further reasoned that the ten weeks in which petitioner remained in such status following the investigation "also did not transform the entire detention into the atypical and significant hardship contemplated in *Sandin*." *Id.* at 4a (citing *Griffin*, 112 F.3d at 706). And "[i]n any event," the court noted, "the forms and affidavits submitted by the Defendants indicate that [petitioner] received psychological assessments and SRO reviews" in compliance with the federal regulations. *Id.* at 5a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. "The Due Process Clause standing alone confers no liberty interest in freedom from state action taken 'within the sentence imposed.'" *Sandin* v. *Conner*, 515 U.S. 472, 480 (1995) (quoting *Hewitt* v. *Helms*, 459 U.S.

460, 468 (1983)). "States may under certain circumstances create liberty interests which are protected by the Due Process Clause," *id.* at 483-484, but those interests are generally limited to freedom from restraint that "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 484.

At issue in *Sandin* was an inmate's sentence to 30 days of disciplinary segregation. See *Sandin*, 515 U.S. at 475. After the inmate sought administrative review of that sentence, he filed a federal civil suit alleging that he was deprived of due process because prison officials refused to allow him to call witnesses at the hearing he was afforded to challenge his punishment. See *id.* at 475-476.

This Court held that petitioner's discipline in segregated conditions "did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest" triggering due process protections. *Sandin*, 515 U.S. at 486. "[A]t the time of [petitioner's] punishment," the Court explained, "disciplinary segregation, with insignificant exceptions, mirrored those conditions imposed upon inmates in administrative segregation and protective custody." *Ibid.* (footnote omitted). Thus, petitioner's confinement "did not exceed similar, but totally discretionary, confinement in either duration or degree of restriction." *Ibid.* "Indeed," the Court noted, the conditions at the prison to which petitioner was assigned involved "significant amounts of 'lockdown time' even for inmates in the general population." *Ibid.* (footnote omitted). The Court thus concluded that, "[b]ased on a comparison between inmates inside and outside disciplinary segregation, the State's actions in placing [the inmate] there for 30 days

did not work a major disruption in his environment." *Ibid.* (footnote omitted).*

In *Wilkinson* v. *Austin*, 545 U.S. 209 (2005), the Court applied those principles to hold that an inmate's assignment to a state "Supermax" facility did implicate a liberty interest under the Due Process Clause because an assignment to that facility "imposes an atypical and significant hardship" within the meaning of *Sandin*. 545 U.S. at 223. "Unlike the 30-day placement in *Sandin*," this Court noted, placement at the Supermax facility at issue in *Wilkinson* "is indefinite and, after an initial 30-day review, is reviewed just annually." *Id.* at 224. This Court further distinguished the outcome in *Sandin* on the ground that placement in the state Supermax facility at issue in *Wilkinson* "disqualifies an otherwise eligible inmate for parole consideration." *Ibid.* (citation omitted).

The Court observed in *Wilkinson* that "[i]n *Sandin*'s wake the Courts of Appeals have not reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant in any particular prison system." 545 U.S. at 223 (citations omitted). This Court decided it was unnecessary to address that issue, however, because the Court was "satisfied that assignment to [the supermax facility in that case] imposes an atypical and significant hardship under any plausible baseline." *Ibid.*

2. Petitioner argues that further review is warranted in this case to address the Due Process "baseline"

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* In a footnote, this Court also noted that petitioner had requested that he be placed in protective custody after he had been released from disciplinary segregation—a fact that provided "some evidence that the conditions suffered were expected within the contour of the actual sentence imposed." *Sandin*, 515 U.S. at 487 n.9.

issue *Wilkinson* identified but did not resolve. Just as this Court found it unnecessary to address that question in *Wilkinson*, however, there is no reason for reviewing here. Under "any plausible baseline," *Wilkinson*, 545 U.S. at 223, the court of appeals correctly concluded that the administrative detention to which petitioner was subjected does *not* impose an "atypical and significant hardship" under *Sandin* and *Wilkinson*.

As the regulations on which petitioner relies make clear, assignment to administrative detention is an ordinary incident of life in the federal prison system and can occur for any number of different reasons. Administrative detention is appropriate, for example, when an inmate is pending classification upon arrival at an institution, as well as when the inmate is awaiting or in the process of transfer to another facility. 28 C.F.R. 541.22(a). The regulations furnish a broad list of additional circumstances in which such a designation is warranted. *Ibid.* The breadth of these reasons shows that, far from imposing an "atypical and significant hardship," *Sandin*, 515 U.S. at 484, administrative detention is an ordinary and expected—if not inevitable—incident of a federal inmate's sentence.

In asserting a deprivation of his due process rights, petitioner relies principally on the length of his assignment to administrative detention. As both courts below held, however, no reasonable fact-finder could conclude that the duration of petitioner's commitment to administrative detention, considered in light of the reasons for the confinement, would be considered an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484. Contrary to petitioner's contention, moreover, decisions

from other courts of appeals would not compel a different result in the circumstances of this case.

Petitioner was in administrative detention for approximately ten months, a period significantly shorter than the duration of detention involved in nearly all of the cases petitioner cites where courts of appeals held an inmate's special confinement to be "atypical." See, *e.g.*, *Tellier* v. *Fields*, 280 F.3d 69, 74 (2d Cir. 2000) (514 days of administrative segregation atypical); *Williams* v. *Norris*, 277 Fed. Appx. 647 (8th Cir. 2008) (12 years administrative segregation atypical). Although the Second Circuit concluded in *Colon* v. *Howard*, 215 F.3d 227 (2000), that 305 days of restrictive confinement gave rise to a protected liberty interest, that case is readily distinguishable from this one because it involved disciplinary segregation in a state prison system and, unlike here, the court emphasized the lack of any indication that such confinement was "typically endured by other prisoners in the ordinary course of prison administration." *Id.* at 231 (quoting *Welch* v. *Bartlett*, 196 F.3d 389, 394 (2d Cir. 1999).

As the courts below properly concluded, moreover, the typicality of an inmate's administrative detention should be judged in part by the reasons for such detention. See Pet. App. 4a, 25a. It is hardly unusual for prison officials to have needed approximately seven months to complete the kind of complex investigation that occurred here, involving suspected misconduct between and among prison inmates and staff. See *id.* at 8a-9a. Petitioner does not argue the contrary.

Nor is it atypical for respondent to have remained in administrative detention for an additional ten weeks after the investigation concluded. Reassignment of an inmate to the general population or to another facility

implicates numerous issues, including complex predictive judgments about the inmate's likely future behavior, potential risks to prison safety and good order, practical concerns such as the availability of cell space at various institutions, matters relating to the inmate's rehabilitation needs, and questions regarding when resources can be freed up to effectuate the inmate's transfer. For those reasons, the federal regulations direct that administrative detention is appropriate where, as here, the inmate "is pending tranfer" to another institution, and the regulations specifically contemplate that reassignment of an inmate from administrative detention may take as long as three months. 28 C.F.R. 541.22(a)(6)(i); Pet. App. 34a (providing that "[e]xcept for pretrial inmates or inmates in a control unit program, staff ordinarily within 90 days of an inmate's placement in post-disciplinary detention shall either return the inmate to the general inmate population or request regional level assistance to effect a transfer to a more suitable institution").

This case is also wholly unlike *Wilkinson*, where an inmate's special detention or segregation was "indefinite and, after an initial 30-day review, * * * reviewed just annually." 545 U.S. at 224. As the courts below noted, defendants attached to their motion for summary judgment "copies of institutional records indicating that thirty (30) day status reviews were provided to the Plaintiff throughout his [time in administrative detention]" and affidavits confirming that he received six separate counseling sessions and nearly a dozen psychological assessments. Pet. App. 27a; see *id.* at 5a.

In any event, both courts below duly considered the matter and found that petitioner's stay in administrative detention did not amount to an atypical and significant

hardship. That fact-bound determination does not warrant this Court's review. Cf. *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) (explaining that this Court will not "undertake to review concurring findings of fact by two courts below in the absence of a very obvious and exceptional showing of error").

3. Even assuming *arguendo* that this case turned on the baseline for determining whether a particular form or period of confinement imposes atypical and significant hardship, further review would not be warranted. In *Wilkinson*, this Court deemed it unnecessary to address that question even though the Court noted that the courts of appeals have applied differing formulations. See *Wilkinson*, 545 U.S. at 223 (citing cases). Petitioner fails to demonstrate that the legal landscape has changed significantly since *Wilkinson* was decided or that the differences among the circuits noted in *Wilkinson* are the kind that require clarification.

The test set forth in *Sandin* and *Wilkinson* is a highly fact-specific inquiry that requires a court to weigh any number of relevant factors, including the duration and conditions of the special confinement in question and whether that confinement can lengthen the inmate's sentence. A court must determine whether, "taken together," *Wilkinson*, 545 U.S. at 224, those factors reveal an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Wilkinson*, 545 U.S. at 223 (quoting *Sandin*, 515 U.S. at 484). All the circuits acknowledge these basic propositions.

Moreover, the cases petitioner cites reveal that the circuits, despite applying sometimes differing verbal formulations, have reached substantially consistent results in applying the *Sandin* test. Thus, the circuits have held that long periods of administrative or disci-

plinary segregation are atypical, see, *e.g.*, *Tellier*, *supra* F.3d 69 (514 days); *Williams*, *supra* (12 years); *Shoats* v. *Horn*, 213 F.3d 140 (3d Cir. 2000) (eight years); *Gans* v. *Rozum*, 267 Fed. Appx. 178 (3d Cir.), cert. denied, 129 S. Ct. 84 (2008) (11 years), while shorter periods generally are not. See, *e.g.*, *Sealey* v. *Giltner*, 197 F.3d 578 (2d Cir. 1999) (101 days not atypical); *Beverati* v. *Smith*, 120 F.3d 500 (4th Cir. 1997) (six months); *Griffin* v. *Vaughn*, 112 F.3d 703 (3d Cir. 1997) (15 months); *Townsend* v. *Fuchs*, 522 F.3d 765 (7th Cir. 2008) (59 days); *Skinner* v. *Cunningham*, 430 F.3d 483 (1st Cir. 2005) (40 days); *Thomas* v. *Warner*, 237 Fed. Appx. 435 (11th Cir. 2007) (20 days). This case, which involved approximately ten months of administrative confinement for reasons specifically identified in the federal regulations, falls squarely within the group of appellate decisions in which the courts have held there was no due process liberty interest at issue.

Because the standard announced in *Sandin* and applied in *Wilkinson* has not led to inconsistent results among the circuits, there is no urgent need to clarify it now. To the contrary, the development of the law in this area would benefit by allowing the courts of appeals to continue to apply the *Sandin* standard to new fact patterns. See generally *United States* v. *Mendoza*, 464 U.S. 154, 160 (1984) (noting the benefit this Court derives from allowing the courts of appeals to explore difficult issues before granting certiorari). This Court recently denied a petition for certiorari requesting clarification of the same purported circuit conflict, *Jordan* v. *Federal Bureau of Prisons*, 127 S. Ct. 2875 (2007), and there is no reason for a different result here.

4. In any event, this case would not be a suitable vehicle for addressing the question petitioner presents

because even if he were able to establish a protected liberty interest, he still would not be entitled to any relief. Petitioner's request for injunctive relief is moot because he has been released from administrative detention and he has not attempted to demonstrate any likelihood that he will be assigned to that status in the future sufficient to satisfy Article III. See generally *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 111 (1983) (possibility that petitioner would again be subjected to police choke hold was too speculative to provide Article III standing to challenge policy concerning use of choke holds; Article III requires a "real or immediate threat that the plaintiff will be wronged again"). Indeed, petitioner's projected release date is May 13, 2009. Thus, even if this Court were to grant certiorari, petitioner likely would have been released long before briefing in this case could be completed.

That leaves only petitioner's claims for monetary relief against the individual respondents, who are entitled to qualified immunity under the second part of the test set forth in *Saucier* v. *Katz*, 533 U.S. 194 (2001). "If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Id.* at 202; see *Brosseau* v. *Haugen*, 543 U.S. 194, 198 (2004) (per curiam) ("If the law at [the time the officer acted] did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation."). To satisfy that standard, a plaintiff must show that the alleged violation was clearly unlawful in the "particularized" sense that a reasonable official would have understood that his actions violated the law in the specific "situation he con-

fronted." *Brosseau*, 543 U.S. at 199 (quoting *Saucier*, 533 U.S. at 202).

At the time the individual respondents acted, the law did not (and still does not) clearly establish that administrative detention for approximately ten months during and shortly after a complex internal investigation under the conditions of petitioner's confinement requires due process protections. To the contrary, as petitioner concedes (see Pet. 10-11), both courts below considered themselves bound as a matter of controlling circuit precedent to hold that petitioner failed to demonstrate a due process liberty interest under the Third Circuit's decision in *Griffin*, *supra*. See Pet. App. 4a-5a; *id.* at 24a-25a. Petitioner does not argue that *Griffin* is distinguishable from this case.

The central thrust of petitioner's argument, moreover, is that the law in this area is confused, not clear. That contention alone defeats any possibility that petitioner could recover damages from the defendants in their individual capacities based on the allegations he advances in this case.

Finally, even if a reasonable fact finder could conclude that petitioner had a liberty interest concerning his administrative detention, it was not clearly established at the time defendants took the actions alleged against them that petitioner was entitled to more process than he received. To the contrary, as the district court found, the record contains "copies of institutional records indicating that thirty (30) day status reviews were provided to the Plaintiff throughout [his term of administrative detention]." Pet. App. 27a. See *ibid.* (noting that the record also contains unrebutted declarations from prison officials explaining that petitioner was given all mandated reviews and psychological assess-

ments during the period of his administrative detention). For these reasons, this case does not provide an appropriate vehicle for clarifying *Sandin*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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FEBRUARY 2009

120 (3)

No. 08-596

Supreme Court, U.S.
FILED
FEB 13 2009
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

JASON SCOTT WILSON,

Petitioner,

v.

WARDEN KAREN HOGSTEN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner, a federal inmate, was placed in highly restrictive conditions of administrative detention for approximately ten months, from April 2005 until February 2006, seven of which were ostensibly in connection with a pending investigation of his possession of a single pornographic magazine. The government does not dispute that, had Petitioner been found to have possessed the magazine, he could have been subjected to disciplinary segregation for a maximum of fifteen days. After the investigation was completed, with no finding of any misconduct, Petitioner was kept in administrative segregation for ten more weeks. The government claims that this additional period was justified because Petitioner was "pending transfer" to another facility, but there is no support for that position in either the record or the applicable Bureau of Prisons ("BOP") regulations. Alleging that he was placed in administrative detention without receiving an initial detention order or hearings before a Segregation Review Official, both of which are procedural protections required by the relevant BOP regulation, Petitioner filed this suit claiming that his Fifth Amendment due process rights had been violated.

There can be no dispute that the circuits are deeply divided over the appropriate standard to

apply to such a claim. Since this Court held in *Sandin v. Conner*, 515 U.S. 472, 484 (1995), that an inmate may have a liberty interest triggering procedural due process protections if a deprivation of rights conferred by the government results in an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life," the lower courts have struggled to determine the "baseline" against which an inmate's conditions of confinement should be compared to determine whether that confinement was atypical. *See generally Wilkinson v. Austin*, 545 U.S. 209, 223 (2005) (recognizing circuit split on this issue). Two circuits have held that the general prison population is the appropriate baseline, with a third moving in this direction; four have interpreted *Sandin* so narrowly that a liberty interest can almost never be found; and five have been unable to articulate any consistent test. Although the government half-heartedly attempts to gloss over these divisions, it is obvious that this Court's guidance is necessary.

Despite the government's strained arguments to the contrary, the question presented is squarely raised here. The government's contention that this Court should decline review because Petitioner's confinement supposedly was not atypical under any baseline has no grounding in the record or in the law. The assertion that this case is not the proper vehicle

to resolve the question presented because the individual respondents may be entitled to qualified immunity is also flawed. If that position were correct, every similar case would be insulated from review because the circuit split renders the law in this area unclear, and this Court's ability to clarify an important constitutional question would be seriously circumscribed.

In short, this Court has recognized the circuit split, the courts of appeals themselves have asked for guidance, and such guidance is necessary to protect inmates' constitutional rights and ensure the uniform administration of federal prisons. Review is warranted.

I. THE CIRCUITS ARE DEEPLY DIVIDED ON WHEN AN INMATE IN ADMINISTRATIVE SEGREGATION MAY POSSESS A LIBERTY INTEREST REQUIRING PROCEDURAL DUE PROCESS.

As explained in the petition, the courts of appeals are deeply divided regarding their baseline of comparison for determining whether an inmate who has suffered a deprivation of rights has been subjected to an "atypical and significant hardship" that triggers a liberty interest. Pet. 14-21. Two courts of appeals – the Fourth and Ninth – have correctly interpreted *Sandin* as requiring the use of

the general prison population as the baseline for determining whether a liberty interest exists, and the Second Circuit has moved in this direction. *See, e.g., Beverati v. Smith*, 120 F.3d 500, 503 (4th Cir. 1997); *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996); *see also Colon v. Howard*, 215 F.3d 227, 231-32 (2d Cir. 2000). Four other courts of appeals – the D.C., Third, Fifth, and Seventh – have, by contrast, interpreted *Sandin* narrowly (although each circuit's interpretation is somewhat different) so that a liberty interest is almost never found. *See, e.g., Hatch v. District of Columbia*, 184 F.3d 846, 858 (D.C. Cir. 1999); *Griffin v. Vaughn*, 112 F.3d 703, 706-09 (3d Cir. 1997); *Carson v. Johnson*, 112 F.3d 818, 821 (5th Cir. 1997); *Townsend v. Fuchs*, 522 F.3d 765, 771 (7th Cir. 2008). The remaining circuits have not clearly articulated a baseline and instead use a case-by-case analysis. *See, e.g., Skinner v. Cunningham*, 430 F.3d 483, 486-87 (1st Cir. 2005); *Harden-Bey v. Rutter*, 524 F.3d 789, 795 (6th Cir. 2008); *Williams v. Norris*, 277 Fed. Appx. 647, 648-49 (8th Cir. 2008); *Thomas v. Warner*, 237 Fed. Appx. 435, 438 (11th Cir. 2007).

The government attempts to gloss over these obvious divisions by dismissing the widely varying tests as mere "differing verbal formulations." Opp. 11. But this Court itself has recognized the split, observing in *Wilkinson* that, "[i]n *Sandin*'s wake the

Courts of Appeals have not reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant in any particular prison system." 545 U.S. at 223. Unable to truly dispute that the circuits are divided, the government is left with two main arguments as to why this Court should not address this issue — that the circuits have nevertheless reached consistent results and that Petitioner's due process claim would fail regardless which baseline is used to analyze it. Neither argument is persuasive.

First, in claiming that the circuits have reached relatively consistent results, the government categorizes the cases based on duration, concluding that the lower courts agree that a long detention in administrative segregation implicates a liberty interest, while what the government claims is a short detention does not. This simplistic analysis falls apart when the cases the government cites are examined. In a number of these cases, although duration of confinement was considered, the holdings were based on qualitative comparisons of the conditions of an inmate's confinement with those of other inmates. *See, e.g.*, *Tellier v. Fields*, 280 F.3d 69, 80, 83 (2d Cir. 2000) (affirming need for factual determination of "nature" of inmate's confinement); *Sealey v. Giltner*, 197 F.3d 578, 589 (2d Cir. 1999) (looking to both duration and conditions to determine

whether confinement in the special housing unit was "atypical"); *Beverati*, 120 F.3d at 503-04 (analyzing atypicality based on inmate affidavits regarding qualitative conditions of confinement). Moreover, the government's suggestion that the duration of an inmate's segregated confinement is an easily-applied litmus test for determining whether a liberty interest is triggered, Opp. 12, is belied by the fact that the lower courts themselves have asked this Court to clarify the law in this area. *See, e.g.*, *Brown v. Plaut*, 131 F.3d 163, 170 (D.C. Cir. 1997) (noting that because of the circuit split, the court faced "a number of unsettled questions about how to apply *Sandin* to this case"); *Wagner v. Hanks*, 128 F.3d 1173, 1176 (7th Cir. 1997) (addressing the question of which baseline should be used and stating, "we would welcome clarification of the issue by the Court").[1]

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[1] The government goes so far as to suggest that the supposedly "consistent" results reached by the courts of appeals mean that there is "no urgent need to clarify [the law]." Opp. 12. As noted above, the courts of appeals themselves disagree with this assessment. Moreover, *Sandin* was decided fourteen years ago, and nothing indicates that percolation is leading to consensus; in fact, as can be seen from the cases cited by both parties, the opposite is true.

Second, the government claims that review is not warranted because Petitioner's confinement in administrative segregation supposedly was not atypical under any baseline. The government bases this erroneous argument on the following assertions: (1) the duration of Petitioner's confinement was shorter than those in cases where the courts of appeals found confinement to be "atypical;" (2) assignment to administrative segregation is an "ordinary incident of [prison] life;" and (3) the additional ten weeks Petitioner spent in administrative confinement after the investigation ended were not atypical because they were "pending transfer." Opp. 8-10. All of these arguments miss the mark, and the Government's contention that Petitioner's last ten weeks in confinement were "pending transfer" is utterly without support in the record.

As an initial matter, the government's focus on the duration of Petitioner's confinement as the driving factor in determining whether he has stated a liberty interest is based on a mischaracterization of both Petitioner's claim and the governing law. Petitioner's claimed liberty interest is based not only on the length of his segregated confinement but also on the highly restrictive conditions imposed and the fact that he spent an additional ten weeks in administrative segregation after any possible

justification for that confinement had ended, which certainly cannot be said to be typical.[2] Pet. 2-3. In addition, *Sandin* makes clear that factors other than duration must be considered in determining whether an inmate has a liberty interest. Although this Court ultimately held that the inmate in *Sandin* had not stated a liberty interest, in reaching that conclusion it compared the inmate's circumstances with those of inmates inside and outside restrictive confinement (including those in the general prison population). 515 U.S. at 486.

Contrary to the government's contention, had Petitioner's claim been analyzed under an appropriate baseline (instead of analyzed simply based on duration as was the case in the court below), it might well have turned out differently. Far from being a "fact-bound determination" that does

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[2] Although the lower courts stated that Petitioner was confined to administrative segregation for approximately ten weeks after the investigation ended, App. 4a, 26a, this is a misreading of the record. The investigation ended on November 17, 2005, and Petitioner was transferred on February 8, 2006. App. 25a-26a. He therefore remained in administrative segregation for almost twelve weeks (eighty-three days) without justification.

not warrant this Court's review, Opp. 11, the outcome of Petitioner's due process claim hinges directly on which baseline is used to analyze it. It is this purely legal question that is presented here. *See generally Sealey*, 197 F.3d at 586 ("The content of the *Sandin* standard of 'atypical and significant hardship' is an issue of law.").[3]

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[3] The government is also simply wrong in asserting that Petitioner's confinement in administrative segregation was too short to be considered "atypical" under any baseline. The government ignores cases where confinements in restrictive custody shorter than Petitioner's, and under similar conditions, were held to trigger liberty interests. *See, e.g.*, *Palmer v. Richards*, 364 F.3d 60, 67-68 (2d Cir. 2004) (finding detention of seventy-seven days could be atypical); *see also Sims v. Artuz*, 230 F.3d 14, 23 (2d Cir. 2000) (noting that Second Circuit has found confinements of 125-288 days to be "relatively long" and potentially atypical). The government does attempt to distinguish one case in which a period of confinement similar to Petitioner's was found to be atypical, *Colon*, 215 F.3d 227 (detention of 305 days), by arguing that it involved disciplinary segregation in a state prison. Opp. 9. *Sandin*, however, looked to the conditions of the inmate's incarceration, not to the label of "administrative" vs. "disciplinary" segregation, to decide whether a liberty interest existed. In addition, that *Colon* involved a state inmate is of no moment because the same analysis applies to federal and state inmates in this area. *See, e.g.*, *Richardson v. Joslin*, 501 F.3d 415 (5th Cir. 2007); *Hill v.*

Next, the government posits that Petitioner's confinement in administrative segregation was not atypical because "assignment to administrative detention is an ordinary incident of life in the federal prison system and can occur for any number of different reasons," citing the governing BOP regulation. Opp. 8. The mere existence of a regulation authorizing the imposition of administrative detention in certain circumstances, however, does not mean that such detention will never work an "atypical and significant hardship." If the government were correct, prison officials could indiscriminately place inmates in restricted custody under the guise of a reason specified in the regulation without fear of review.

Fleming, 173 Fed. Appx. 664 (10th Cir. 2006); *Tellier*, 280 F.3d 69; *Crowder v. True*, 74 F.3d 812 (7th Cir. 1996). Finally, the government also attempts to distinguish *Colon* on the ground that, "unlike here, the court emphasized the lack of any indication that such confinement was typically endured by other prisoners in the ordinary course of prison administration." Opp. 9 (internal quotation marks omitted). Remarkably, the government has reversed the *Colon* court' s placement of this burden on the *state*, which, like the government here, failed to offer such proof. *Colon*, 215 F.3d at 231.

Finally, the government attempts to insulate this case from review by claiming that Petitioner's final ten weeks in administrative segregation were not atypical because they were pending his transfer to another institution. Opp. 9-10. This argument is specious at best. ***Nothing*** in the record indicates that there was any justification for Petitioner's continued segregated confinement after the investigation ended. To the contrary, even the District Court found "that there was a continuing legitimate need for the Plaintiff's SHU confinement until November, 2005," App. 25a, not for the ensuing ten weeks.

The mere fact that Petitioner was eventually transferred to another facility in February 2006 does not, as the government apparently believes, give rise to an inference that he was "pending transfer" from the time the investigation ended. In addition, the regulation the government cites for the idea that continued assignment to administrative detention pending transfer is appropriate concerns only reassignments from disciplinary detention, not administrative detention, where Petitioner was held. *See* 28 C.F.R. § 541.22(a)(6)(i). Common sense dictates that confinement to administrative segregation without justification cannot be typical of ordinary prison life.

In short, the government's attempts to cast Petitioner's confinement as typical and to gloss over

the circuit split have no basis in the facts or the law. There is no doubt that the question presented warrants review. This issue has seriously divided the courts of appeals. The decision of the court below and the decisions of the D.C., Fifth, and Seventh Circuits are in tension with this Court's decisions in *Sandin* and *Wilkinson*. Pet. 22-24. The confused state of the law has resulted in an untenable situation in which the constitutional rights of federal inmates differ depending on the circuit in which they are incarcerated. Review is warranted.

II. THIS CASE IS A PROPER VEHICLE TO CONSIDER THE QUESTION PRESENTED.

In the face of this obvious need for clarity, the government falls back on the position that this case is not the proper vehicle to address the question presented because, even if Petitioner could establish a protected liberty interest, he is not entitled to any relief. Opp. 12-15. The government first argues that Petitioner's injunctive relief claim is moot because he is due to be released in May 2009. Opp. 13. Under this logic, however, many cases would similarly be insulated from review simply because of the time necessary to reach this Court. Even if this argument were correct, Petitioner's claim for monetary relief is not moot.

In recognition of this, the government next

argues that this Court should deny review because Petitioner has no basis for monetary relief, claiming that the individual respondents are entitled to qualified immunity under *Saucier v. Katz*, 533 U.S. 194 (2001),[4] because the law in this area is not clearly established.[5] Opp. 13. This position, if accepted, would prevent review in all cases where an inmate (or other person proceeding under *Bivens* or § 1983) with only a damages claim presented a

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[4] This Court recently held in *Pearson v. Callahan*, 172 L. Ed. 2d 565 (U.S. 2009), that the *Saucier* test for qualified immunity is no longer mandatory.

[5] The government claims both that the circuit split renders this area of the law unclear and that it also was not clearly established that Petitioner was entitled to more process than he received. This latter point is simply incorrect. Under the governing BOP regulations, Petitioner was entitled to an administrative detention order within 24 hours of his placement in administrative detention, 28 C.F.R. § 541.22(b), and due process mandates that an inmate placed in administrative segregation receive "some notice of the charges against him." *Hewitt v. Helms*, 459 U.S. 460, 476 (1985). The government does not dispute that Petitioner never received such an order or any notice. Moreover, due process requires, at a minimum, "an informal, nonadversary review of the information supporting [the inmate]'s administrative confinement," *id.* at 472, which also was never provided.

legitimate constitutional argument in a developing area of the law. That cannot be correct. If it were, such plaintiffs would be left without any recourse, and this Court's ability to clarify important constitutional questions would be severely circumscribed.

This Court recognized as much in *Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998), stating that, in appropriate cases, qualified immunity issues should be set aside in favor of clarifying important constitutional questions. The Court noted that "if the policy of [constitutional] avoidance were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals." *Id.* Cases involving the question presented that do not also involve a potential qualified immunity defense are unlikely to come before this Court. Qualified immunity should not be a barrier to review.

CONCLUSION

For the foregoing reasons and those previously stated, the petition should be granted.

Respectfully submitted,

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February 13, 2009